

II.

The trial court erred in sentencing Bobby to death without personally addressing him because this violated Bobby’s rights to allocution, due process and freedom from cruel and unusual punishment. Rule 29.07(b)(1); U.S.Const., Amends. V,VIII,XIV; Mo.Const., Art. I, §10,21. Although the court gave counsel a chance to state “any legal reason why sentence should not now be imposed,” it did not give Bobby a chance personally “to present to the court his plea in mitigation.” Had the court addressed Bobby personally, there is a reasonable probability that it would not have sentenced Bobby to death as Bobby could have informed the court that AAG Smith won his death sentences by lying.

After hearing argument from counsel and overruling the motion for new trial, the court turned to sentencing (Tr.2037-2071). It asked, “is there any legal [reason] why sentence should not now be imposed;” counsel replied that she was unaware of any (Tr.2071). The court sentenced Bobby to death for the murder of Amanda Perkins (Tr. 2071-2073). Turning to Sondra’s murder, it asked “does he have any legal cause in this—on this count;” counsel reiterated that she was aware of none (Tr.2074). The court sentenced Bobby to death (Tr.2074-2075). The State then asked, “was there going to be any allocution granted to the Defendant?” (Tr.2075). Bobby never got to address the court with his personal plea in mitigation: that the State obtained its death verdicts against him by lying to the court and jury. This violated his state and federal rights to allocution, due process and freedom from cruel and unusual punishment. This Court must reverse.

Rule 29.07(b)(1) gives defendants the right to address the court before sentence is imposed. *State v. Whitfield*, 837 S.W.2d 503,514 (Mo.banc1992). The State realized the court's error and asked, "Your Honor,...was there going to be any allocution granted to the Defendant?" (Tr.2075). The court replied flatly that Bobby was granted allocution and "[n]o cause was shown after the motion for new trial was denied." *Id.* The court erred in so casually disregarding Bobby's well-entrenched right. Rule 30.20.

Rule 29.07(b)(1) places an affirmative burden on the court to inform defendants of the verdict and to offer defendants the right to speak before sentencing. The only exception is when "the *defendant* has been heard on a motion for new trial." *Id.* (added). This Court can only affirm if it was enough for defense counsel to be heard on the motion for new trial. But this Court must give effect to the plain and ordinary meaning of the Rule's language. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439,449 (Mo.banc1998). Elsewhere in Rule 29.07, when this Court meant counsel, it said so: "upon request of defendant or the attorney for the defendant, allow the defendant and the attorney for the defendant access to the complete [PSI]." Rule 29.07(a)(2). When creating the right to allocution, this Court only referred to the "defendant." Bobby was the *defendant* in this case, and he was not heard on the motion for new trial (Tr.2037-2070).

Assuming *arguendo* that Rule 29.07(b)(1) obviates the need for allocution if "the attorney for the defendant" has been heard on the new trial motion, the Rule deprives Bobby of due process and freedom from cruel and unusual punishment. Hearing counsel argue matters in the motion for new trial does not lessen the need to hear defendants' personal pleas in mitigation. *Green v. U.S.*, 365 U.S. 301,304 (1961). After all, "[t]he

most persuasive counsel may not be able to speak for a defendant as the defendant might with halting eloquence, speak for himself.” *Id.* The Constitution does not grant a right to allocution. *Hill v. U.S.*, 368 U.S. 424,428 (1962). But, once granted by a state rule, allocution must be dispensed in accord with due process. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1,7 (1979).

In *State v. Wise*, 879 S.W.2d 494,516 (Mo.banc1994), this Court recognized that it may be unconstitutional to deny a defendant’s affirmative request to speak personally to the court at sentencing. Indeed, *Hill* specifically left open that possibility, noting,

[W]e are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak.

368 U.S.at429. This Court faces precisely this scenario.

After the court imposed sentence, even the State asked whether *Bobby* would be afforded allocution. The court affirmatively denied Bobby that opportunity. Several federal courts have found such action to be unconstitutional. *Wise, supra, citing U.S. v. Moree*, 928 F.2d 654,656 (5th Cir.1991); *U.S. v. Jackson*, 923 F.2d 1494,1496 (11th Cir. 1991); *Ashe v. N.C.*, 586 F.2d 334 (4th Cir.1978); *also Boardman v. Estelle*, 957 F.2d 1523,1530 (9th Cir.1992). This Court should follow these federal courts—at least with respect to capital sentencing. Death is different, and its qualitative difference requires

greater reliability than any other sentence. *Woodson v. N.C.*, 428 U.S. 280,305 (1977). Nowhere is the right of a defendant personally to address the court with his plea in mitigation more important than in capital cases.

By depriving Bobby of this opportunity, the court unwittingly left itself uninformed, and indeed, misinformed. Given the opportunity to make his plea in mitigation, Bobby could have opened the court's eyes to the lies the State told to win these two death sentences. The State successfully portrayed Bobby as a man who views human beings as objects and who stabs fellow inmates (Tr.1920-1921,1928,2005). Had the court addressed *Bobby*, Bobby could have told the court that the State lied; that the prison investigators "Cleared" Bobby after investigating that stabbing incident; and that Bobby had saved the lives of two prison guards in Kentucky. (Point I,*supra*; Appendix --). The court sentenced Bobby to die based in part upon the State's blatant lies. No more arbitrary factor exists. *See* §565.035.3(1).

The right of allocution is "deeply embedded in our jurisprudence." *U.S. v. Myers*, 150 F.3d 459,463 (5th Cir.1998). Its violation, even if not a constitutional violation as it is here, cannot be harmless. *Id.*; *U.S. v. De Alba Pagan*, 33 F.3d 125,129 (1st Cir.1994); *U.S. v. Patterson*, 128 F.3d 1259,1261 (8th Cir.1997). This Court must vacate Bobby's death sentences and remand for resentencing where he may fully inform the court of the relevant circumstances.

III.

The trial court abused its discretion in overruling Bobby’s objection and letting the State present evidence that Bobby asked Michael James about buying a gun because such ruling deprived Bobby of due process, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. This evidence did not tend to prove any matter in issue; indeed, the question about buying a gun related to a hypothetical robbery, references to which the court properly excluded as an uncharged crime. This question about buying a gun was irrelevant to the charged murders so AAG Smith edited reality, falsely asserting that the gun proved deliberation.

The State charged Bobby with the murders of Sondra Mayes and Amanda Perkins (L.F.10-11,81-86). Although Sondra and Amanda both died from multiple stab wounds (Tr.1656-1658,1699-1701), the State—over continuing objection—told the jury that four days before the murders Bobby asked Michael James “where he could buy a gun” (Tr.1217-1218,1232). But, wait, Bobby asked Michael about buying a gun so he could rob Donnie Storm, and the trial court excluded any reference to that hypothetical robbery as evidence of an uncharged crime (Tr.1217-1218; L.F. 430). The question about buying a gun had *no* relevance to the charged murders until AAG Smith edited reality.

Trial courts have broad, but not unfettered, discretion in admitting evidence. *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc1993). Before admitting evidence, trial courts must decide (1) whether the evidence is logically relevant (does it tend to prove or disprove a fact in issue?) and (2) whether it is also legally relevant (does its probative

value outweigh its prejudicial affect?) *Id.* Evidence that diverts the jury’s attention or causes “prejudice wholly disproportionate” to its logical relevance should be excluded. *State v. Rousan*, 961 S.W.2d 831,848 (Mo.banc1998). The question is whether the evidence tended “to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. U.S.*, 519 U.S. 172,180 (1997).

“Where can I buy a gun?” proved no matter in issue

Bobby was charged with stabbing Sondra and Amanda, not shooting them (Tr. 1217). Undeterred by this factual discrepancy, Smith claimed that Bobby’s question about buying a gun tended to prove his intent—i.e., that he deliberated (Tr.1212,1815). That’s nonsense. As Point I,*supra*, illustrates, the gun had *nothing* to do with these murders. Bobby asked Michael about buying a gun so he could rob Donnie Storm, but this did not stop Smith. She complained that “whatever reason he was giving for looking for a gun, he’s looking for a weapon and that can be evidence of premeditation and ... deliberation.” (Tr.1217). Only in Smith’s contorted view of reality. She cannot edit the facts to suit her purpose. Had Bobby merely asked Michael about a gun without any further explanation, then, *perhaps*, the gun would tend to prove deliberation. But he didn’t. He specifically told Michael that he needed a gun to rob Donnie Storm. The trial court properly excluded the hypothetical robbery, but admitted the question about buying a gun with which to commit that robbery (Tr.1217). As with the robbery, the gun had no logical relevance to these murders. Admitting this evidence violated Bobby’s state and federal rights to due process, a fair trial and freedom from cruel and unusual punishment.

“Where can I buy a gun” created undue prejudice

Smith intentionally used this evidence to mislead the jury. *See* Point I. With the court’s ruling having severed the gun from the robbery, Smith latched on to it to create the crucial element of her case—deliberation. She contorted the facts and created prejudice “wholly disproportionate” to the gun’s probative value. She assured the jury that the gun proved deliberation: “Michael James told us on the 6th or 7th [Bobby] was at his father’s store complaining about problems with his wife and looking for a gun. That’s premeditation. *That’s deliberation.*” (Tr.1815)(added).

Actually, that’s a lie, and “a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This Court must reverse Bobby’s convictions and remand for a new trial.

IV.

The trial court erred in refusing Bobby's request to give a "no-adverse-inference" instruction in penalty phase because such ruling deprived Bobby of due process, silence, a fair trial and freedom from cruel and unusual punishment and his privilege against self-incrimination. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Bobby did not testify in penalty phase, and he asked the court to give the "no-adverse-inference" instruction. The court sustained AAG Smith's objection to that instruction and refused to give it. Smith then referred the jury to Bobby's silence.

Bobby did not testify in guilt phase (Tr.IV-X), and the court gave the jury the "no-adverse-inference" instruction (L.F.353). Bobby also did not testify in penalty phase, and he repeatedly asked the court for the "no-adverse-inference" instruction (Tr. Xi-XII,1851-1859,1882-1883). AAG Smith proclaimed that it would be improper to give the "no-adverse-inference" instruction in the penalty phase: "[T]hey've already been instructed on it. That's sufficient." (Tr.1855). Purportedly relying on MAI-CR3d 313.30A, Notes on Use 4, the court sustained Smith's objection and refused to give the "no-adverse-inference" instruction (Tr.1882; L.F.401,413). This violated Bobby's state and federal rights to due process, silence, a fair trial and freedom from cruel and unusual punishment.

The Fifth Amendment privilege guarantees defendants not only the power to stand silent, but also the right not to have the jury draw an adverse inference from his silence. *State v. Storey*, 986 S.W.2d 462 (Mo.banc1999); *Carter v. Kentucky*, 450 U.S. 288,305 (1981). Contrary to AAG Smith's assertion, this Fifth Amendment privilege does not

differentiate between the guilt and penalty phases of a capital trial. *Storey* at 463; *Estelle v. Smith*, 451 U.S. 454, 462-463 (1981). Indeed, “when a defendant does not testify in the penalty phase..., the court *must give* a ‘no-adverse-inference’ instruction if the defendant so requests.” *Storey* at 464 (added).

Bobby first proposed Instruction No. G, modifying MAI-CR3d 308.14 to reflect the law and circumstances of the penalty phase: “Under the law, the defendant has the right not to testify. No presumption and no inference of any kind as to his punishment may be drawn from the fact that he did not testify.” (L.F.401). Expanding her objection, Smith complained that by deleting “of guilt may be raised,” the instruction left open the possibility that the jury could now consider Bobby’s silence for other factors (Tr.1859). Smith was concerned this would “could confuse the jury since they’ve now been told, don’t consider it for anything, and now they’re being limited, don’t consider it on punishment. The inconsistency is – it’s a big concern.” (Tr.1859). The concern is ridiculous! For what exactly, besides punishment, would the jury be considering Bobby’s failure to testify during the **penalty phase** of his trial?

If Smith’s objection was that “as to his punishment” should modify presumption and not inference, Bobby alleviated that concern with his Instruction No. P: “Under the law, a defendant has the right not to testify. No presumption as to punishment may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.” (L.F.413). Smith voiced no concerns with this instruction, but, pointing to MAI-CR3d 313.30A, Notes on Use 4, the court refused this instruction too (Tr.1882-1883). No reasonable reading of Note 4 can validate the court’s refusal to give Bobby’s

“no-adverse-inference” instruction. That note specifically contemplates giving the “no-adverse-inference” instruction, “with necessary modifications” to reflect the law and circumstances of the penalty phase. *Id.* The trial court erred.

Storey, supra, concluded that, to avoid reversal, the State must show that the error was harmless beyond a reasonable doubt. *Storey, supra*. It cannot do that. here. Capital sentencing juries never *have* to give death. *Id.* Even if they find that the aggravators outweigh the mitigators, they have discretion to assess life. *Id.* “In light of this discretion, the prejudice against a defendant who invokes the privilege—prejudice which is ‘inescapably impressed on the jury’s consciousness’—is not purely speculative.” *Id.* at 464-465 (citation omitted).

The court told the jury not to consider Bobby’s silence during the guilt phase, but not during the penalty phase. This glaring omission gave the jury a roving commission to weigh Bobby’s silence while deciding whether he should live or die. Indeed, Instruction Nos. 27 and 33 invited this by telling the jury it “may consider all of the evidence presented” in both stages (L.F.386,394). The jury could have reasonably believed it could consider Bobby’s silence as an aggravating factor. “Jurors are not lawyers; they do not know the technical meaning of ‘evidence.’ They can be expected to notice a defendant’s failure to testify, and, without limiting instruction, to speculate about incriminating inferences from [his] silence.” *Carter*, 450 U.S. at 303-304.

In *Storey, supra*, the State argued that the error was harmless since Storey’s attorney had addressed Storey’s right not to testify during general voir dire. *Id.* at 465. This Court reiterated the well-established principle that “[s]tatements by defense counsel

... ‘cannot have had the purging effect that an instruction from the judge would have had.’” *Id.*, quoting *Carter*, 450 U.S. at 304.

Bobby’s attorney also addressed this issue in general voir dire—eight days before the jury deliberated Bobby’s punishment (Tr.III-IV,XII). Counsel first asked if anyone would want to hear from Bobby, and Smith objected (Tr.834). Counsel then repeated the court’s suggestion, "The Court *will instruct* you and you will be advised by Judge Long that Bobby Mayes does not have to testify." (Tr.835)(added). The court then prompted counsel to ask, “Who can’t follow the instruction.” *Id.* These statements do not purge the prejudice. The court refused to give the jury an instruction to follow in the penalty phase.

Finally, in *Storey, supra*, the State sought refuge in the fact that it had not commented on Storey’s silence. But such a comment would create a wholly separate violation of the Fifth Amendment, and failing to violate a second constitutional right cannot render harmless the first violation. *Id.* Bobby, however suffered both violations. Having avoided the “no-adverse-inference” instruction, Smith incited the jury to consider Bobby’s failure to testify: "The ***Defendant*** already ***had his say*** on August 10th, 1998, when he took both their lives" (Tr.2024)(added). The harm created is inescapable.

Failing to give the “no-adverse-inference” instruction was not harmless. This Court must reverse Bobby’s death sentences.

V.

The trial court (a) abused its discretion in sustaining the State's objections and limiting Bobby's cross-examination of Snitch Cook and (b) erred/plainly erred in failing to instruct the jury regarding the special situation of snitches because such rulings deprived Bobby of due process, a fair trial, confrontation and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII, XIV; Mo.Const., Art. I, §§ 10,18(a),21. The State had no evidence connecting Bobby to these murders, until Cook came along hoping for leniency on his pending crimes. Cook made that connection for the State, and the court prevented Bobby from showing Cook's full motive to lie. Bobby was entitled to show that Cook burgled his own uncle's bar, that Cook's criminal problems had lingered for a year-old and that he was about to become a father when he snitched. Cook was not an ordinary witness, and Instruction No.1 did not guide the jury on the credibility concerns unique to Jailhouse Snitches. Without a special cautionary instruction, Bobby will suffer manifest injustice.

In August 1998, while released on bail, David Cook practiced his trade—burglary and stealing (Tr.1186). Again arrested, he returned to jail, facing up to twenty-eight years in prison on two counts each of burglary and stealing (Tr.1186,1191-1193); §§ 569.170,570.030. But those twenty-eight years paled by comparison to the life sentence he faced for having used a hacksaw to escape (Tr.1193-1194); §575.210.3(1). He found his opportunity for leniency on August 10, 1998 when Bobby was arrested and became his cellmate (Tr.1185).

The State had suspicions but no evidence connecting Bobby to the tragic murders of Sondra and Amanda. Nothing, that is, until its clandestine midnight meeting on August 17, 1998 with Cook and his attorney (Tr.1182-1184,1194-1195). Cook played hard-to-get, saying very little at this meeting, and the State decided not to write a report. *Id.* Immediately thereafter, the State moved Cook to a different county (Tr.1185, 1381). A few weeks later, Cook pleaded guilty to one burglary, and the State dismissed the other burglary and both stealings (Tr.1196-1197). The State then reduced Cook's class A felony escape to a class D felony escape, and he pleaded guilty to it (Tr.1196-1197). He got two concurrent five-year sentences, but, better yet, he got paroled after serving only about six months (Tr.1196-1197,1206).

At this point, the State still had nothing more from Cook than it had gotten on August 17, 1998. But a few months passed, and Cook, being Cook, violated his parole and returned to jail (Tr.1206). On August 16, 1999, he met with police for a second time. *Id.* Cook hoped to benefit by testifying that Bobby supposedly said he killed Sondra during an argument about Sondra's decision not to testify for him in "some kind of sex case"¹ and that he killed Amanda when she saw him killing Sondra (Tr.1181-1183, 1185,1214).

Although this conflicted with the State's theory that Bobby killed Amanda in the morning then waited for Sondra to come home for lunch and killed her (Tr. 1811-1816), the State finally had its connection to Bobby. But at what price to justice?

¹ Point VII,*infra*.

Jailhouse snitches are inherently untrustworthy. *Dodd v. State*, 993 P.2d 778,784 (Okla.Crim.App.2000); *Carriger v. Stewart*, 132 F.3d 463,479 (9th Cir. 1997)(en banc). Their willingness to lie taints the judicial process and cheapens justice. *Dodd, supra* at 784,n.7. Indeed, they constitute the leading cause of wrongful capital convictions. Mills and Armstrong, *The Jailhouse Informant*, Chicago Tribune, 11/16/1999; also Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 125, 139 (1998)(35% of erroneous capital murder convictions due to perjury)(cite omitted).

The State's case against Bobby boiled down to this snitch, and Bobby's sole mechanism for showing Cook's motive to fabricate—his right to confront and cross-examine, was denied. *Davis v. Alaska*, 415 U.S. 308,319 (1974). The court let the State hide much of Cook's baggage from the jury. For example, Cook burgled his *uncle's* business (Tr.1196-1197); his crime spree began in the fall of 1997 (Tr.11207-1208); and he and his girlfriend were having a baby (Tr.1207). These show a desperate man, who was especially susceptible to seeking leniency. *State v. Lockhart*, 507 S.W.2d 395,396 (Mo.1974)(prior charges and the facts supporting a plea may be shown where it would show the witness' motive to testify favorably for the State or his specific interest/bias, or prove he testified expecting leniency from the State.). This information would have shown that, after nearly a year of dodging the prosecutor's wrath only to extend his crime spree, Cook knew his time on the streets was running out—just in time to miss the chance to hold his newborn child. His only means of avoiding a long prison sentence was to help the State.

In *Dodd*, the State had “two primary pieces of evidence.” *Dodd*, 982 P.2d at 783. Nearly three hours before anyone knew the manner of death, Dodd told his supervisor that the victims’ “throats had been cut.” *Id.* Later, while incarcerated awaiting trial, Dodd “supposedly” told an inmate that he had gone to the victims’ apartment to get his checks and take whatever drugs were there, but “things ‘went wrong.’” *Id.* at 782-783. The snitch later recanted, writing letters accusing the State of asking him to lie. *Id.* at 782. The trial court precluded impeachment of the snitch with these letters. *Id.* Because and the snitch was a “key witness” to the “wholly circumstantial” case, the *Dodd* court held that this unduly restricted Dodd’s confrontation right. *Id.* at 783.

Here, the State also had two primary pieces of evidence connecting Bobby to the murders: a neighbor who saw Bobby’s car at the house at 12:15 pm and heard it leave at 1:00 pm (Tr.961-963); and Cook who claimed that Bobby confessed to him (Tr.1181-1183). Nothing else tied Bobby to this crime. His bloodied fingerprint on the bathroom sink merely raised suspicions (Tr.1546-1548). Assuming the blood was human, it merely put him in the house, where, of course, he had to be to find Sondra and get the phone (Tr.1018-1021,1546-1548). And, whether suspicious or not, the cuts on Bobby’s hands do not prove that he strangled Amanda. His explanation that he cut his hands while fishing (Tr.1134,1159-1162,1324,1423-1426) was not “transparently frivolous.” *State v. Dexter*, 954 S.W.2d 332,342 (Mo.banc1997). The court abused its discretion and violated Bobby’s state and federal rights to due process, a fair trial, confrontation and freedom from cruel and unusual punishment. *See Davis, supra.*

The question, as it was in *Dodd*, is whether this error requires reversal. “Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that [he] received some sort of benefit....” *Dodd*, 993 P.2d at 783. Though smart enough to avoid setting a quid pro quo, the State nonetheless gave Cook hope, rewarding him simply for beginning to snitch (Def.Ex.P). Hoping for the benefit of leniency, Cook ultimately gave the State its crucial link between Bobby and the crime. Since confrontation was denied, the State got to present that link, unencumbered by Cook’s excess baggage. *Cf. State v. Hedrick*, 797 S.W.2d 823,826 (Mo.App.,W.D.1990). This Court must reverse.

Certainly, some occasions require use of a jailhouse snitch. *Dodd, supra* at 785 (Strubhar,P.J.,concurring). That use, however, “carries considerable costs, especially in death-penalty cases,” and the court must protect itself and society from “unreliable professional jailhouse...snitch[es], who routinely trade dubious information for favors.” *Id.* When the State chooses to rely on a snitch, the court must give a cautionary instruction, guiding the jury through the treacherous task of assessing his credibility. *Id.* at 783-784; *State v. Grimes*, 982 P.2d 1037 (Mont.1999); §1127a, Calif.Pen.Code(1989). In reversing, the *Dodd* court mandated using the following cautionary instruction to address this unique problem:

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer’s testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything

(including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.

Id. at 783-784. California courts must give a similar instruction:

The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling the witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in light of all the evidence in the case.

§1127a, *supra*.

Missouri has no approved instruction, but that does not excuse the trial court from giving a cautionary instruction. Trial courts must instruct in accordance with the substantive law. *State v. Carson*, 941 S.W.2d 518 (Mo.banc1997). Here, that required giving a cautionary instruction. *Dodd, supra*. MAI-CR3d 302.01 tells jurors how to determine the “believability” of ordinary witnesses, but gives no guidance in tackling the unique problem of whether to believe a snitch. This Court has previously held that MAI-

CR3d 302.01 is the “only appropriate jury instruction regarding credibility of witnesses.” *State v. Silvey*, 894 S.W.2d 662 (Mo.banc1995)(no separate instruction required to assess credibility of witness age 10 or younger). In the overwhelming majority of cases, that instruction does suffice. There is nothing unique, for example, about the age of a witness. There is, however, something very unique about a snitch. Snitches comprise the single greatest risk of wrongful convictions. Juries must be told to look at them differently because they are different. Without a specific cautionary instruction, the court could as well have told the jurors to read tarot cards or tea leaves.

Of course, AAG Smith did not rely on such psychic games. She assured the jury that it “should believe David Cook” and that “Cook was telling us the truth.” (Tr.1822-1823). Vouching for and bolstering Cook’s credibility, Smith pulled him up by the bootstraps of evidence purportedly admitted just for motive: “Is he a liar? No. He knew about things that only Bobby Mayes would have known. He knew about the pending trial for sex charges.” (Tr.1822; Point VII,*infra*). *Compare Carriger, supra* at482)(undisclosed evidence that would have impeached the snitch was not cumulative, nor harmless given the prosecutor’s “strenuous vouching” for the snitch’s credibility during closing argument).

This Court must reverse Bobby’s convictions and remand for a new trial where he may fully impeach Cook and where the jury will be properly cautioned regarding this jailhouse snitch.

VI.

The trial court erred in sentencing Bobby to death because such sentences are disproportionate under §565.035.3 and thus violate Bobby's rights to due process and freedom from cruel and unusual punishment. U.S.Const., Amendments V,VIII,XIV; Mo.Const., Art. I, §§10,21. The State won these death sentences not with an "evenhanded, rational and consistent" case, but with an underhanded, irrational and erratic one. Bobby's death sentences are the freakish result of the State's reliance on lies and emotion. It intentionally lied in accusing Bobby of stabbing a fellow inmate; it willfully incited the jury with its plea that "emotion is fair;" and it desperately clung to the erratic testimony of an inherently unreliable snitch to connect Bobby to the murders.

Bobby's Death Sentences Resulted from Arbitrary Factors

Death is different from any other sentence. *Woodson v. N.C.*, 428 U.S. 280,305 (1977). It is the most solemn decision society can make, and in making that decision juries necessarily try to predict the defendant's probable future conduct. *Skipper v. S.C.*, 476 U.S. 2,5 (1986). Bobby has impulse control and intermittent explosive disorders, but they can be controlled with medication in "a very structured environment" (Tr.1911, 1918,1921). These facts are mitigating. *Skipper, supra*. Rather than address them fairly and evenhandedly, AAG Smith opted to lie. Points I,II,*supra*. Knowing that the investigation "**Cleared**" Bobby, Smith accused him of stabbing a fellow inmate in Kentucky (Tr.1927-1928; Appendix __)(added). A "reasonable likelihood" exists that Smith's lies affected the jury's decision to impose death. *Giglio v. U. S.*, 405 U.S.

150,153 (1972); *Napue v. Illinois*, 360 U.S. 264,271 (1959). It is bad enough that Smith lied to obtain Bobby's conviction. Points I,III,*supra*. But to win his execution? That is reprehensible. This violated Bobby's state and federal rights to due process and freedom from cruel and unusual punishment.

Smith intentionally lied to create the illusion that Bobby posed a danger in prison when the opposite is actually true. Not only did Bobby *not* stab a Kentucky inmate, but he also *saved* the lives of two Kentucky guards (App.A-19-21). How many people have saved even one life? At present, Bobby has saved three (App.A-19-21,51): (1) in January, 1980, Bobby "prevented his [corrections] instructor from being injured by another inmate" (App.A-19); (2) in January, 1987, Bobby found a guard "at the point of 'Blacking-out' from choking, and he "quickly responded by performing the Heimlich Maneuver" (App.A-20-21); and (3) most recently, in January, 2001, Bobby thwarted an inmate's suicide attempt (App.A-51). The State's underhanded tactics degrade the system and cloak the jury's death verdicts in arbitrariness.

Smith edited Dr. Ferguson's opinion to suit her purpose and slur Bobby's character. Dr. Ferguson had noted that Bobby did not see people in the ink-blot test, indicating a long-standing personality disorder (Tr.1912). Dr. Ferguson agreed that this also indicated that Bobby "sees people as objects" "some of the time" (Tr.1921). But "some of the time" wasn't what Smith wanted, so she contorted this into a wholesale character-flaw, extrapolating that since Bobby sees people as objects, he should die. (Tr.2005). Really? Bobby should die because he did not describe ink-blot as people?

Don't most people see people as objects from time-to-time? Smith had to see Amanda as an object or she wouldn't have blown-up that degrading photograph of Amanda's rectum being spread apart by two sets of gloved-hands. Points VIII,*infra*. Smith viewed Bobby as an object, or she couldn't have so easily lied to win his execution. Interestingly, the National Student Research Center, E-Journal of Student Research, Vol.5, No.3, 3/1997,² found that most people do not describe "people" in such ink-blot tests, seeing, instead clothing, monsters, crabs, headless chickens and octopuses. Nearly everyone is familiar with the wine glass that is supposed to be a face, but what about this ink-blot:



How does seeing this as two sea horses rather than a witch with a big nose make one person more worthy of being executed than another. Smith sought and won Bobby's death sentences on wholly arbitrary factors.

Bobby's Death Sentences Resulted from Passion

Smith choreographed an emotionally charged attack with bare suspicions and sexual innuendo, Points IX,*infra*, ghastly displays of Amanda's spread rectum, refracted

² <http://youth.net/nsrc/ejournals.ejou028.html>

scalp and emptied chest, Point VIII,*infra*, and emotional pleas, Point VIII,XII,*infra*.

Displaying an autopsy collage, Smith incited jurors' passions (Tr.2001-2005). She lied to the jurors, telling them that "emotion is fair." (Tr. 2001). Then, she got emotional—weeping (Tr.2003-2004). In *State v. Taylor*, 944 S.W.2d 925,937 (Mo.banc1997), Smith's office conceded that it could not invite the jury to base its death verdict on emotions. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.*, quoting *Gardner v. Florida*, 430 U.S. 349,358 (1977). Indeed, this Court took special note of its statutory duty to "determine whether the sentence was imposed under the influence of "passion, prejudice, or any other arbitrary factor." *Id.*, citing §565.035.3 (1). Bobby's sentences were imposed because of passion, violating his state and federal rights to due process and freedom from cruel and unusual punishment; this Court must vacate them.

Bobby's Death Sentences Resulted from Wholly Unreliable Evidence

As fully discussed in Point V,*supra*, the State had suspicions, but no physical evidence connecting Bobby to these murders. It relied on Snitch Cook to provide that connection. Jailhouse snitches are inherently untrustworthy, and their willingness to lie taints the judicial process and cheapens justice. *Dodd v. State*, 993 P.2d 778,784,n.7 (Okla.Crim.App.2000); also *Carriger v. Stewart*, 132 F.3d 463,479 (9th Cir. 1997)(en banc). Indeed, snitches are the leading cause of wrongful capital convictions. Mills and Armstrong, *The Jailhouse Informant*, Chicago Tribune, 11/16/1999; also Gross, *Lost*

Lives: Miscarriages of Justice in Capital Cases, 61 Law & Contemp. Probs. 125, 139 (1998)(35% of erroneous capital murder convictions due to perjury)(cite omitted).

When reviewing the proportionality of a death sentence, this Court reviews the whole record, "independent of the findings and conclusions of the judge and jury." *State v. Chaney*, 967 S.W.2d 47,59 (Mo.banc1998)(citation omitted). The General Assembly created this independent review "as an additional safeguard against arbitrary and capricious sentencing and to promote evenhanded, rational and consistent imposition of death sentences." *Id.* Bobby's death sentences cannot withstand even an iota of scrutiny; they are based wholly on lies and emotions. The State pulled the wool over the eyes of the judge and jury. This Court can and must remedy that.

VII.

The trial court abused its discretion in (1) letting the State elicit the sexual nature of Bobby's pending trial and (2) refusing to reopen voir dire so that Bobby could measure the impact of such evidence because these rulings deprived Bobby of due process, a fair trial, freedom from cruel and unusual punishment and to be tried only for the charged offenses. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,17,18(a),21. To show a motive, the State was entitled to elicit that Bobby had a criminal trial set for the day after the charged murders, but the sexual nature of that trial was not strictly necessary to show motive. Indeed, the State did not just use the sex trial to show motive but used it simply to inflame the jurors who Bobby could not voir dire for possible bias from the sexual “allegations” and “charges.”

Error to let the State use sexual “allegations” and “charges” in guilt phase

"Trials of charges for which there is a human abhorrence should be conducted with scrupulous fairness to avoid adding other prejudices to that which the charge itself produces." *State v. Alexander*, 875 S.W.2d 924,929 (Mo.App.,S.D.1994). Here, the State charged Bobby with two counts of capital murder and described the bloody scene in interminable detail (Tr.1025-1074,1234-1303,1339-1389). Not content, the State then injected additional prejudice beyond what these charges engendered. Leaving the scene altogether, the State turned the jurors into voyeurs. It dangled Bobby's pending charges of “sexual allegations” and “sexual misconduct” before the jury under the guise of showing Bobby's motive. While the existence of pending charges may have had some

tendency to show motive, the sexual nature of those pending charges—now dismissed—added nothing but prejudice.

Generally, the State cannot elicit that the defendant has been accused of another crime or crimes. *State v. Sloan*, 786 S.W.2d 919, 922 (Mo.App.,W.D.1990). Uncharged crimes are inadmissible unless they legitimately and clearly establish the accused's guilt of the charged offense, or establish motive, intent, absence of mistake or accident, a common plan or identity. *State v. Holbert*, 416 S.W.2d 129,132 (Mo.1967). “[T]he dangerous tendency and misleading probative force of this class of evidence require that its admission be subjected by the courts to *rigid scrutiny*.” *Id.*(added).

Bobby was set to stand trial on August 11, 1998 (Tr.1333). He had endorsed Sondra and Amanda to testify on his behalf (Tr.1333-1334). According to jailhouse snitch David Cook, Bobby killed Sondra because she was refusing to testify (Tr.1181-1182). The State called this “one possible” motive (Tr.934), but it wanted something more titillating. It wanted the jury to know that the pending trial involved sex (Tr.933-934,1181-1182,1332-1334,1815,1822,1835). Over Bobby’s repeated objections to this wholly irrelevant evidence, the court let the State refer to “sexual allegations” or “sexual misconduct” (Tr.86-88,129-133,879-881,906-919,933-934,1332-1333; L.F.423-425; Supp.L.F.1-4). This violated Bobby’s state and federal rights to due process, a fair trial, freedom from cruel and unusual punishment and to be tried only for the charged offenses.

Wasting no time, the State told the jury about Bobby’s pending trial for “sexual allegations” in opening statement (Tr.933-934). Then it called its snitch, and Cook claimed that Bobby told him he and Sondra argued because she would not testify for him

in “some kind of sex case” (Tr.1881). According to Cook, Bobby got “really mad,” “smacked” Sondra, and “started stabbing her.” *Id.* Still not satisfied, the State called the Texas County Acting Clerk (Tr.1331). Holding her red Circuit Court file, she testified that Bobby’s pending trial in CR598-1075FX involved “sex charges” (Tr.1331-1333, 1418). Two days later, jurors noticed this inch-thick, red Circuit Court file bearing Bobby’s name in the Jury Room (Tr.1403-1420).

As detailed in Point III, *supra*, this Court reviews for an abuse of discretion. *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc1993). Admitting evidence that diverts the jury’s attention or causes “prejudice wholly disproportionate” to its logical relevance is an abuse of discretion. *State v. Rousan*, 961 S.W.2d 831,848 (Mo.banc1998). Put another way, uncharged crimes can only be admitted when they are strictly necessary. *State v. Collins*, 669 S.W.2d 933,936 (Mo.banc1984).

In *Collins*, informant Howell testified that he had known Collins for “several years” and had sold marijuana to Collins. *Id.* at935. Collins countered that he had only seen Howell once—over a month before the charged offense—and Howell was with Woods. *Id.* at936. Two other witnesses corroborated Collins, but the State called Woods to impeach Collins, eliciting that Collins had previously sold Howell marijuana. *Id.* The State had every right to impeach Collins by showing that he and Howell had met face-to-face previously. *Id.* This Court, however, reversed because no “strict necessity” existed to use the uncharged crime to accomplish the impeachment. *Id.*

Similarly, the State had every right to present evidence of motive by contending that Sondra was refusing to testify for Bobby in his August 11, 1998 trial. The State had

no right, however, to describe that trial as one involving “sexual allegations” and “sexual charges.” The sexual nature of the case lacked any logical relevance. Motive could be inferred regardless of what charges Bobby was facing. The *existence* of a pending trial and Sondra’s status as a reluctant witness tended to show “one possible reason.” The sexual nature of that case added nothing but prejudice.

The court abused its discretion in letting the State prejudice the jury in this manner, but, of course, “the question [for this Court] is whether the evidence had an effect on the jury’s deliberations to the point that it contributed to the result reached.” *State v. Barriner*, No.SC81666, slip op.21 (Mo.banc12/27/2000). Of course, it contributed. The State stirred the jury’s curiosity in opening statement, calling these unrelated sex charges “one possible reason” for the charged murders (Tr.933-934). But the State did not limit itself, or the jury, to using this evidence to find motive. Indeed, the State did not request the limiting instruction (MAI-CR3d 310.12) so that it could use these “sex charges” to argue that Bobby did not go fishing--“Nobody on the planet in their right mind who isn’t a cold blooded murder [sic] is going to go fishing the day before a trial on sex charges” (Tr. 1835). The State used the pending “sex charges” for much more than motive, and it cannot show that this improper evidence did not contribute to the jury’s verdict.

Error to foreclose voir dire on potential bias stemming from evidence of “sex charges”

Bobby moved *in limine* to exclude this evidence (Supp.L.F.1-4). Twice before trial, his attorneys argued this motion, but got no ruling (Tr.86-88,118-120). Four days before trial, counsel stressed the need to rule this before “the actual questioning of the

jury,” and the court agreed to rule by fax the next day (Tr.118-120). But it didn’t rule the next day (L.F.63). Immediately before voir dire, counsel again requested a ruling, and the court concluded that the State could elicit that Bobby told Cook that he was going to trial the day after the murders (Tr.129-132). Counsel requested a “limiting nature on that,” but the court replied, “we’re not nearly to that [point].” (Tr.132).

Immediately before opening statements, the court finally decided that the State could also elicit that Bobby’s pending trial involved “sexual allegations” or “sexual misconduct” (Tr.907-912). Counsel objected that the court’s refusal to rule earlier had prevented voir dire on this crucial issue and asked that he be able “to individually question the jurors as to whether they can be fair and impartial in this case if they hear evidence [Bobby] was scheduled to go to trial the following day on *allegations of sexual misconduct*.” (Tr.912)(added). The court refused (Tr.913).

Voir dire seeks “to discover bias or prejudice in order to select a fair and impartial jury. *State v. Clark*, 981 S.W.2d 143,146 (Mo.banc1998). “One aspect of...a defendant’s right to an impartial jury is an adequate voir dire to identify unqualified jurors.” *Id.* *Clark* illustrates the importance of full voir dire. Precluded from “question[ing] the venire on ‘the age of the [three year old] victim,’” Clark received two death sentences. *Id.* at 147. This Court reversed. *Id.* On remand, Clark received LWOP and twenty years. *State v. Clark*, No. ED77197 (Mo.App.,E.D.)(pending).

Courts must exercise sound discretion in precluding a line of inquiry. *ClarkI*, 981 S.W.2d at146. Indeed, courts should give parties “liberal latitude” to examine jurors for

potential biases about facts in the case. *Id.* Sexual crimes are viewed with enormous disgust, and Bobby needed a chance to probe the jurors' biases.

The frequency of verdicts of guilty on [sexual] charges..., upon evidence not strong enough to secure convictions on other charges, demonstrates the fact that [the sexual] charge itself injects more or less prejudice into the minds of the jury, and such prejudice sometimes attains such force as to compel the defendant to prove himself innocent beyond a reasonable doubt, in order to secure an acquittal.

State v. Hedrick, 797 S.W.2d 823,826 (Mo.App.,W.D.1990). The court abused its discretion, and a “real probability” exists that this error injured Bobby. As in *ClarkI*, here, the State utilized the rules of primacy and recency to create a “real probability” of harm. The State first told the jury about the pending “sex charges” during opening statement (Tr.933-934). Ending with a flourish, it hammered the “sex charges” in closing argument (Tr.1815,1835). This Court must reverse.

VIII.

The trial court abused its discretion in overruling Bobby's objections and

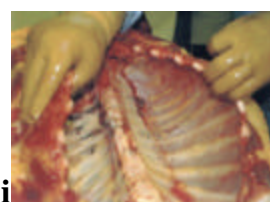
admitting Exs.43f



,43g



,43i



three autopsy photographs of Amanda because these rulings deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§ 10,18(a),21. The crime did not produce these shockingly gruesome photographs, the State's single-minded effort to inflame the passions and prejudices of the jury did; after all, the State's pathologist negated any arguable evidentiary purpose of showing the jury these vulgar, horrid and repulsive pictures on a 60"TV. Basing Bobby's conviction and death sentences on emotional pleas to "look at the pictures" cannot be tolerated.

Amanda was found in her bedroom with 20 stab wounds to her back and sides (Tr. 1669,1678-1689). The State introduced 18 crime scene photographs of Amanda's body and 11 autopsy photographs (Tr.1279,1282-1283,1291-1293,1344-1368,1660-1702). Six of the wounds were life-threatening (Tr.1683-1684,1688-1689,1693). While Exhibit 43h, a collage of three photographs that the State utilized in its penalty closing, depicted all of Amanda's wounds (Tr.1678-1693,2004); **Exhibit 43f** depicted none, and neither did **Exhibit 43g**. **Exhibit 43i** depicted seven wounds from *inside* Amanda's emptied chest cavity. "[T]he designation of [these] pictures as being gruesome is a gross

understatement.” *State v. Robinson*, 328 S.W.2d 667, 671 (Mo.1959). Worse, their shock-value comes, not from the crime’s brutality, but from the State’s. The State ghoulishly projected its 9x12 glossy pictures onto a 60” TV (Tr.1053,2043).

As with other evidence, courts have broad discretion in admitting logically and legally relevant photographs. *State v. McMillin*, 783 S.W.2d 82,101 (Mo.banc1990). Photographs of a dead body are logically relevant if they show the crime scene, the victim’s identity, the body’s condition/location, or if they prove an element or help the jury understand testimony. *State v. Rousan*, 961 S.W.2d 831,844 (Mo.banc1998). Such photographs should not be excluded because they are also inflammatory, unless their inflammatory nature outweighs their probative value. *Id.* “Insofar as photographs tend to be shocking or gruesome, it is almost always because the crime is shocking or gruesome.” *Id.* But, when a court admits photographs solely aimed at inflaming the jury and prejudicing the defendant, reversal is necessary. *Robinson, supra.*

In *State v. Floyd*, 360 S.W.2d 630,631 (Mo.1962), the coroner identified a crime scene picture, noting that the “body was too badly decomposed” to determine the cause of death. *Id.* at631-632. Since “eight or nine” witnesses had already described the body’s location, the “manifestly inflammatory” nature of the picture outweighed its minimal probative value. *Id.* at631-633. This Court reversed. *Id.* at633.

Here, the pathologist described Ex.43f as depicting an enlarged rectum (Tr.1674-1675). Sexual assault was one “possible” etiology so he removed and inspected a 6-8” section of Amanda’s rectum (Tr.1675). He found no evidence of sexual assault (Tr. 1675-1676). Exhibit 43f had no logical relevance and neither did Exhibit 43g.

Exhibit 43g depicted Amanda's head with her scalp removed (Tr.1694). The pathologist noted a blunt trauma to her skull, which may have "induced unconsciousness...stunned her...[or] *done nothing*." (Tr.1694-1695)(added). "The pathologist negated any arguable evidentiary value of the[se] photographs." *State v. Middleton*, 339 S.E.2d 692 (S.C.1986) (convictions and death sentence reversed because refracted scalp and open vaginal cavity pictures had far greater prejudicial effect than probative value); *also State v. Roberson*, 1995 WL 765009, (Tenn.Crim.App.1995)³ (refracted scalp picture did not depict fatal injury, thus "the especially gruesome and inflammatory nature of the photograph substantially outweighed any probative value it had."). The court abused its discretion in admitting these vulgar pictures, thereby violating Bobby's state and federal rights to due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment.

Exhibit 43i depicts Amanda's emptied chest cavity. The pathologist pointed to seven wounds (Tr.1696-1697). To orient the jury, he identified the spine and noted that "[t]he white areas are the ribs." (Tr.1696). He did not use this gruesome picture to explain the nature of her injuries; he did that with Ex.43h (Tr.1678-1693). Ex.43i simply vulgarly presented Amanda like a slab of meat. And, once the pathologist's testimony left Ex.43i, the court told the State to "place that [face] down...It was partly up." (Tr.1697).

In *State v. Stevenson*, 852 S.W.2d 858,861-862 (Mo.App.,S.D.1993), the State used a picture showing the victim's internal chest cavity, and not merely entrance and exit wounds. *Id.* at862. The Southern District concluded, "We would be hard-pressed

³ Only available on Westlaw.

not to reverse the judgment because of the introduction of the two photographs were it not for two facts: punishment was assessed by the court and not the jury, and the evidence of the defendant's guilt was strong." *Id.* at863. Chief Judge Parrish wrote separately, condemning the State's "reprehensible" use of "such evidence." *Id.* at865 (concurring).

These "unique circumstances" simply do not exist here. First, the evidence of Bobby's guilt was not overwhelming. The jury gave much thought to whether Bobby was fishing at the time of these murders, asking several questions during deliberations (Tr.1837-1840). The State cannot show beyond a reasonable doubt that the jury did not consider or could not have been influenced by these "manifestly inflammatory" pictures. *State v. Alexander*, 875 S.W.2d 924,929 (Mo.App.,S.D.1994). A picture, after all, is worth a thousand words, and AAG Smith ensured that these repulsive pictures hung in the minds of the jurors, pleading with them,

[L]ook at the pictures. You can ask for all the evidence. Please do that. Look at these pictures. They're not fun, but they speak to us in a way that Sondra and Amanda cannot and we cannot avoid and we cannot pretend or turn our heads from their only way of telling us what happened to them.

(Tr.1811)(added).

Second, this jury not only assessed Bobby's punishment, it sentenced him to die. The State reincorporated the pictures of Amanda's spread anus, refracted scalp and emptied chest-cavity for penalty phase (Tr.1887; L.F.386,394). AAG Smith choreographed an emotionally-charged attack. She lied to the jurors that "emotion is

fair.” (Tr.2001). And, although emotional pleas warrant reversal, *see* Point XII,*infra*. Smith misled the jury by example, becoming “excessive[ly] emotional[.]” while discussing Ex.43h (Tr.2003-2004). Smith then reiterated her request that the jury look at all the exhibits (Tr.2004-2005), thereby creating an impermissible risk that Bobby’s death sentences were based on wholly irrelevant considerations.

Even if this Court finds that admitting Exs.43f,g,i was harmless as to Bobby’s guilt, it cannot do so as to Bobby’s death sentences. Death is different. *Woodson v. North Carolina*, 428 U.S. 280,305 (1977). “[It] differs more from life imprisonment than a 100-year prison term differs from one of only a year or two, [and] there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Id.* It is essential to Bobby and society that his death sentences “be, and appear to be” based on reason and not emotion. *Gardner v. Florida*, 430 U.S. 349,358 (1977). The United States Supreme Court granted *certiorari* in *Thompson v. Oklahoma*, 487 U.S. 815,820-821 (1988) to decide whether similarly vulgar photographs rendered Thompson’s death sentence unreliable. The Court, however, reversed that sentence on other grounds, leaving this question unanswered. *Id.* at 838,n.48. These ghastly pictures invited the jury to impose death because of the postmortem degradation Amanda suffered at the hands of the State rather than the character of Bobby or the circumstances of the crime. *Zant v. Stephens*, 462 U.S. 862,885 (1983). This Court must reverse Bobby’s death sentences.

IX.

The trial court abused its discretion in overruling Bobby’s repeated objections and letting the State present its bare suspicion that Bobby sodomized Amanda because those rulings deprived Bobby of due process, a fair trial before a fair, impartial jury, freedom from cruel and unusual punishment and to be tried only for the charged offense. U.S.Const., Amends., V,VI,VIII,XIV; Mo.Const., Art. I, §§10,17,18(a),21. Supposition abounded; evidence did not. Neither the dissection of Amanda’s rectum nor her Rape Kit showed signs of sodomy, but, clinging to its titillating theory, the State wove sexual innuendo throughout the trial, using

- a. a picture of two gloved hands spreading Amanda’s anus (Ex.43f);**
- b. speculation from Watson and Anderson that Amanda was “redressed” postmortem;**
- c. Watson’s description of an “almost white” stain Amanda’s comforter;**
- d. Amanda’s fitted-sheet (Ex.27) with Bobby’s sperm (Ex.20o); and**
- e. the Rape Kits for Amanda (Ex.25) and Bobby (Ex.12b);**

to knit a case out of whole cloth.

Extrapolating from Bobby’s pending trial for “sexual charges” (Point_VII,*supra*), the State theorized that, before killing Amanda, Bobby had sodomized her. It had no such evidence—just bare suspicion. Its theory entreated the jury to believe that Bobby did it before; he did it again. This is grossly improper. *State v. Bernard*, 849 S.W.2d 10,13 (Mo.banc1993). “[T]he dangerous tendency and misleading probative force of this

class of evidence require that its admission be subjected by the courts to *rigid scrutiny*.”
State v. Burns, 978 S.W.2d 759,761 (Mo.banc1998).

Defending against *evidence* of uncharged crimes is difficult enough. *Id.* But defending against the *mere suspicion* of uncharged crimes is impossible. Suspicious because Amanda’s clothes were in disarray and her rectum appeared larger than normal, the pathologist went “the extra mile” looking for evidence of sodomy (Tr.1621,1664-1666,1675-1676). He found none (Tr.1675-1676). Despite dissecting Amanda’s rectum, he found none of Bobby’s sperm/hair on/in Amanda (Tr.1579-1582,1779-1780); and Amanda’s rectum had no tears/bruises/lacerations (Tr.1676). Nonetheless, the State clung to its notion that Amanda was sodomized.

“The possibility that a thing may [have] occur[red] is not alone evidence, even circumstantially, that the thing did occur.” *Boyington v. State*, 748 So.2d 897,901 (Ala.Crim.App.1999). The pathologist’s “inde[ces] of suspicions” may have warranted him going “the extra mile” to investigate, but they did not warrant the court’s admitting the State’s bare suspicions as evidence against Bobby. This Court vests broad discretion in the trial court’s decision to admit evidence. *Bernard, supra*. But courts cannot admit information that forces jurors simply to “choose between suspicions.” *See State v. Huff*, 296 S.W. 121,122 (Mo.1927). The ultimate question is whether the trial court admitted evidence that tended “to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. U.S.*, 519 U.S. 172,180 (1997). To answer this, we must consider whether the evidence is logically and legally relevant.
Bernard, supra.

To be logically relevant, evidence must either directly, or by inference, establish the fact. *Id.* None of the State’s “evidence” directly establishes that Amanda was sodomized, so the question is whether it creates that inference. An inference is a “deduction or conclusion from facts or propositions *known* to be true.” *Draper v. Louisville & N.R.Co.*, 156 S.W.2d 626,630 (Mo.1941)(added). The State lacked “facts or propositions known to be true” from which the jury could deduce that Amanda was sodomized. It had nothing but supposition; “conjecture based on the possibility that a thing could have happened.” *Id.* For example, “[b]ecause the agents of the defendant could have seen the decedent when they were 924 feet away from him, it *may be supposed* that they did see him, but it *cannot be inferred* because there are no proven facts on which to base the inference.” *Id.*(added).

Here, the court let State create a case out of whole cloth, weaving supposition upon supposition. This violated Bobby’s state and federal rights to due process, a fair trial before a fair and impartial jury, freedom from cruel and unusual punishment and to be tried only for the charged offenses.

That sperm consistent with Bobby was on Amanda’s bed (Tr. 1564-1569,1739-1744,1749-1750;Exs.20o,27) was certainly suspicious. But the State had no facts from which to infer that it was deposited on Amanda’s bed at the time of her murder. Indeed, the State’s expert admitted it was impossible to determine when the sperm got on the bed (Tr.1749-1750). Nonetheless, the State paraded its suspicions before the jury, showing them a picture of the blood-soaked sheet with the “whitish stain” (Tr.1293-1295), and, later, draping the sheet before them (Tr. 1564-1568). Still not satisfied, the State showed

the jury a picture of the blood-soaked comforter spotted with “almost white” stains, despite never having had those stains tested (Tr. 1351-1355; Exs.21g,29).

That Amanda’s clothes were in disarray also simply raised suspicions (Tr. 1664). The State had no proven facts from which to infer that this disarray resulted from a sodomoy; it simply took this suspicious circumstance and dangled it before the jury. It had Officer Watson testify that Amanda’s clothes had been “pulled-up,” implying Bobby did this after killing her (Tr.1355-1356). Then, it elicited the pathologist’s hypothesis that Amanda “*may have been redressed* by another individual” postmortem (Tr.1664-1668)(added). He based this on two things: (a) Amanda’s “underwear appeared to be rolled,” which is not how *he* wears *his* underwear (Tr. 1664) and (b) there were feces on Amanda’s calves, but not on her thighs (Tr.1668). This defies logic. If the feces was smeared on Amanda’s calves by pulling up her underwear and shorts, the logical inference is that feces would also be smeared on her thighs. Anyone who has removed a soiled Pull-Up[®] from a toddler knows that it is much easier to keep feces off calves than thighs.

That Amanda “may have been redressed” is not proof that she was, nor is it a fact from which that inference could reasonably be drawn. “A doctor's opinion ... *must have a substantial basis in the facts actually established*, and such opinion cannot be invoked to establish the facts.” *White v. American Republic Ins. Co.*, 799 S.W.2d 183,193 (Mo.App.,S.D.1990)(original); *also Craddock v. Greenberg Mercantile, Inc.*, 297 S.W.2d 541,548 (Mo.1957).

That Amanda's "rectum appeared to be larger than [usual]" had several possible etiologies (Tr. 1675). It could have resulted from strangulation (Tr. 1615). It could have resulted from relaxation upon death. *Id.* But, clinging to the "possibility" that it resulted from sexual assault, the State blew-up a picture of Amanda's anus being spread by two sets of gloved hands (Tr.1674; Ex.43f; Point VIII). The pathologist took this picture to explore the possibility of sexual assault; after all, he had to consider *every* possibility (Tr.1615). In doing that, he took the extraordinary step of removing a 6-8" section of Amanda's rectum (Tr.1675-1676). Despite going this "extra mile," he found *nothing*—no tears, no bruises, no lacerations (Tr.1615,1676). The State had no proof, but insisted on going the extra mile to flaunt the most degrading picture available like a billboard on the court's 60" TV (Tr. 2042-2043). There was *no* injury to Amanda's rectum, no proof that she was sodomized. Unlike, pathologists, juries cannot consider every *possibility*; they must consider only proven *facts* or inferences drawn therefrom. *Huff, supra*. Since the gross examination of Amanda's rectum proved nothing to the pathologist, the picture of that examination proved nothing. "If a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision." *Catchings v. State*, 684 So.2d 591,597 (Miss.1996)

Finally, knowing that no physical evidence of sodomy existed (Tr.1706), the State tenaciously persisted in presenting its suspicions through other measures. It told the jury that the pathologists took Rape Kit samples from Amanda and Bobby (Tr.1561,1563-1564,1675). Again, this investigation proved nothing! There was no sperm/semen (let alone Bobby's) in any of Amanda's samples. *Id.* There was no foreign hair on Amanda

or Bobby (Tr.1779-1780). The existence of these Rape Kits proved nothing; they simply kept the suspicions flowing.

The suspicions and innuendo presented in this case are far worse than the evidence this Court recently condemned in *State v. Barriner*, No.SC81666 (Mo.banc12/27/2000). There, the State had copious *evidence* that Barriner *had engaged* in uncharged sexual misconduct. *Id.* at7-16. Here, the State had only *supposition* that Bobby *may have* sodomized Amanda. The dangerous tendency and misleading force of uncharged misconduct *evidence* grows exponentially when the uncharged misconduct exists only as a *possibility*. The court abused its discretion in admitting these titillating suspicions.

Nevertheless, the question, now, is whether these suspicions effected the jury's deliberations to the point of contributing to the result. *Id.* at21. Of course, it did. As in *Barriner*, the State deliberately planted its seedy suspicions before the jury. *Id.* The State built its entire case against Bobby around its sexual suspicions. This was not a passing-shot, or inadvertent slip-of-the-tongue. The State tenaciously adduced an incredible amount of innuendo over Bobby's repeated and continuing objections (Tr. 868-875,1353-1356,1457-1459,1475-1477,1485-1486,1506-1507,1624-1625,1664-1666,1675-1677; L.F.340-344,420-422). AAG Smith knew she had no *proof* of a sexual assault: "It ... does not mean she was sexually assaulted. However, it does not mean she was not." (Tr.872). That is not enough to make Smith's suspicions logically or legally relevant. The State's deliberate use of such copious innuendo weighs in favor of reversal. *Barriner*, slip op.20.

Smith knitted a case out of whole cloth, highlighting one suspicion after another after another after another. She begged the jury to turn her supposition into its inference. Alluding to the notion that Amanda “may have been dressed by another individual” postmortem, Smith asked, “How else do you get apparent feces on the back of her calves, but nowhere else?” (Tr.1812). Then, wrapping her argument around the stained sheet she had draped before the jury, Smith proclaimed, “He was sodomizing her ...⁴ How do we know that? Fourteen-year-old girls don’t have sperm. Women don’t have sperm. Men do. Look at the sheet.” *Id.* Saying sodomy, doesn’t make it so. Immediately before this, Smith pleaded with the jury to “look at the pictures” (Tr.1811). The repulsively degrading picture that proved nothing ensured that the State’s suspicions and innuendo would have “a lasting impact on the jury.” *Barriner*, slip op.21.

Finally, the State cannot hide behind overwhelming evidence of Bobby’s guilt. While it made a submissible case, it lacked overwhelming evidence. Absolutely *no* physical evidence connected Bobby to these tragic murders. The bloody fingerprint on the bathroom sink proves only that Bobby was in the house at some point, and he was—he found Sondra (Tr.1018-1021,1546-1548). *Cf. State v. Dexter*, 954 S.W.2d 332,342 (Mo.banc1997)(victim’s blood on t-shirt in Dexter’s truck and high velocity blood spatters on Dexter’s jeans could not be explained by contact with victim, but error was not harmless). The cuts on Bobby’s hands may raise suspicions, but Bobby told police he had cut his hands while fishing that day (Tr.1134,1159-1162,1324,1423-1426). That

⁴ The court overruled counsel’s objection to this. *Id.*

explanation is not a “transparently frivolous.” *Dexter, supra* at 342. The State’s physical evidence also showed the DNA of someone other than Bobby, Sondra or Amanda on a t-shirt also containing Sondra’s blood (Tr.1548-1549,1734-1736).

What the State had was a wholly unreliable snitch (Point V,*supra*). It knew that its evidence was not overwhelming or it would not have lied to the jury that Bobby’s question about buying a gun proved he had deliberated these murders (Points I,III,*supra*).

To avoid reversal the State must show that admitting this sexual innuendo was harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279,310 (1991). It cannot do so. This Court must reverse Bobby’s convictions.

X.

The trial court plainly erred in entering judgment and sentence, depriving Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV and Mo.Const., Art.I, §§ 10,18(a),21. When the court asked the venire “whether you or any of your loved ones or close friends have ever been the victim of a crime," Foreperson Rouse held her tongue, willfully evading her duty to explain her “yes” response on her Qualification Form. “Through neglect,” Bobby’s attorneys did not bring this to the court’s attention until the motion for new trial. If left uncorrected, Foreperson Rouse’s lie will cause a manifest injustice since Bobby was convicted and sentenced to die “not by a jury of twelve, but by eleven jurors and one intermeddler.”

Bobby exercised his right to have his fate determined by a fair and impartial jury. This “mandate[d] that potential jurors answer *fully* and truthfully *all the questions* posed to them during voir dire.” *State v. Martin*, 755 S.W.2d 337,339 (Mo.App.,E.D.1988) (added). “The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive or knowingly untrue, the talesman, when accepted is a juror in name only.” *Clark v. U.S.*, 289 U.S. 1,11 (1933).

Here, the court, itself, questioned the panel about law enforcement employment, crime victims, criminal convictions and undue hardships. It implored the veniremembers to “pay attention” and to line-up at the bench if they had any response to a series of questions (Tr.146,448). On crime victims, the court asked "whether you or any of your

loved ones or close friends have ever been the victim of a crime." (Tr.146). The court again directed every juror with *any* response to line-up at the bench. *Id.* Juror Herzog asked the court to clarify "family," and the court replied, "It's any relative of yours...." (Tr.146).

Approximately 50 members on that first panel marched forward to answer one or more of the court's questions, but Alice Rouse, Juror 55, did not (Tr.146-259). Rouse willfully evaded the court's questions, withholding that she or a relative had been victimized by crime (Tr.146-259; L.F.445). Rouse lied to become a juror—an officer of the court. *Clark, supra* at 11-12. It is not her concealment or false swearing that warrants condemnation. "She [should be] condemned for that she made use of false swearing and concealment as the means whereby to accomplish her acceptance as a juror...." *Id.* at 11. She "deprive[d] Bobby of his right to challenge for cause or to exercise his peremptory challenges." *Martin*, 755 S.W.2d at 339. Once on the jury, Rouse finagled the job of foreperson—signing her name to the verdicts (L.F.377-380, 414-415).

The qualifications of a juror should be determined before the jury is sworn. *State v. Hermann*, 283 S.W.2d 617, 618-619 (Mo.1965). When jurors answer falsely or practice deception, however, courts may consider the issue any time before sentencing. *Id.* After all, "an irregularity in the selection of those who will sit in judgment 'casts a very long shadow.'" *Dyer v. Calderon*, 151 F.3d 970, 983 (9th Cir.1998). Rouse's deceptive practice was overlooked during voir dire. It was, however, uncovered before sentencing (L.F.419-420). In deciding whether Rouse's deceptive practice requires a new trial, this Court will consider whether (1) the topic was explored during voir dire, (2) she

“intentionally conceal[ed] the truth” and (3) defense counsel did not know about her deception. *Martin*, 755 S.W.2d at 340. Under these circumstances, “an inference of bias and prejudice by the juror arises.” *Id.*

The court actually explored this topic during voir dire (Tr.146,448). Indeed, before posing the question, the court told the panel to “pay attention.” *Id.* Rouse simply chose not to respond (Tr.146-259). She chose to be deceptive—to conceal the truth, thereby violating Bobby’s state and federal rights to due process, a fair and impartial jury and freedom from cruel and unusual punishment.

“Intentional nondisclosure ... occurs when there exists no reasonable inability to comprehend the information asked of the jury and the juror actually remember[ed] the experience.” *Martin*, 755 S.W.2d at 340. No reasonable person could have failed to comprehend what information the court sought. It sought very simple information and phrased its question simply and directly. Rouse understood the question and remembered the answer. About four months earlier, the Marion County Board of Jury Commissioners notified Rouse that she “had been selected for jury duty.” (L.F.445). Before her jury duty could commence, Rouse had to complete and return a “Qualification Form.” On it, she certified to the Commissioners that she or a relative had been “a victim of a crime.” *Id.*

From the Form, the court found that Rouse had already “informed the Court, in writing” that she or a relative had been victimized by crime and thus need not answer when asked in open court (Tr.2056). This finding defies reason. If Rouse had no obligation to answer this crime victim question during voir dire, why did the court ask it? Indeed, why did the court ask any of the questions from the Form? The court asked only

three of the Form's seventeen questions. Presumably those questions had special significance and the court wanted answers. Or was the court simply wasting its time and resources by asking irrelevant questions that the veniremembers could ignore at their discretion? The court had told the entire venire, "Your answers must not only be truthful but they *must be full and complete*." (Tr.135) (added); MAI-CR3d 300.02. Rouse swore to give full and complete answers. She did not. She became an officer of the Court through deceit. *Clark, supra* at 12. Her deceit deprived Bobby of his right to challenge for cause or to exercise his peremptory challenges. *Martin*, 755 S.W.2d at 339.

Although Bobby's attorneys had all of the Forms (Tr.2055-2056), "[t]hrough neglect," they did not make the connection during voir dire that Rouse had deceived the court (L.F.419-420; Tr.2056). They overlooked the needle in the haystack. This is not the situation where complaining counsel "knows" about the deception and turns a blind eye, thereby participating in the deception. Bobby attorneys did not acquiesce to Rouse's deceptive practice. They did not know about Rouse's deception any more than the court did. Indeed, the court had collected the Form and asked the question during voir dire. Rouse deceived the court. The court cannot assume the role of inquisitor, yet simultaneously absolve itself of responsibility to elicit the truth. "[T]he trial judge cannot wait for defense counsel to spoon feed him every bit of information which would make out a case of juror bias...." *Dyer*, 151 F.3d at 978.

Neither party nor the court *knew* about Rouse's deception during voir dire. Bobby's attorneys brought it to the court's attention as soon as practicable, which meets the purpose of the preservation rules. Preservation is not a procedural trap. *State v.*

Pointer, 887 S.W.2d 652, 654 (Mo.App.,W.D.1994). The goal is not to avoid appellate review, but to enable it by requiring the error to be fairly presented to the trial court. *Id.* Bobby did that.

Rouse's intentional deception raises an inference of bias. *Martin, supra.* To ignore her misconduct because Bobby's attorneys had the information but overlooked it would cause a manifest injustice. Rule 30.20. Justice Cardozo long ago observed that one who practices deception to gain a seat on the jury becomes a "juror in name only." *Clark*, 289 U.S. at 11. Rouse's role with the court and the parties was "tainted in its origin; it [was] a mere pretense and sham." *Id.* Because of her deception Bobby "was not convicted [and sentenced to die] by a jury of twelve, but by eleven jurors and one intermeddler." *Dyer*, 151 F.3d at 983. This Court must reverse Bobby's convictions and sentences and remand for a new trial.

XI.

The trial court abused its discretion in overruling Bobby's objection and striking Juror Morgan for cause because this deprived Bobby of due process, a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V, VI, VIII and XIV; Mo.Const., Art. I, §§ 10, 18(a) and 21. Juror Morgan unequivocally stated that she could "realistically consider" the death penalty, but simply could not sign a death verdict. This difficulty did not prevent or substantially impair Morgan from abiding by her oath and the court's instructions.

Over Bobby's objection, the court struck Juror Morgan for cause (Tr.299; L.F. 419). The court had no discretion to disqualify Morgan. She unequivocally testified that she could "realistically consider" the death penalty (Tr.273). But the State moved to disqualify Morgan since she said she could not be foreperson (Tr.272-273,299). This did not disqualify her. Indeed, moments before striking her, the court ruled that "if they haven't equivocated but they still cannot fulfill that obligation as the foreperson, the Court is going to allow them to sit" (Tr.294). The court abused its discretion in striking Morgan simply because she could not sign the verdict. This violated Bobby's state and federal rights to due process, a fair and impartial jury and freedom from cruel and unusual punishment.

Morgan would only be *disqualified* from serving on Bobby's if her views would have prevented or substantially impaired her from following the law and abiding by her oath. *Wainwright v. Witt*, 469 U.S. 412,423 (1985). "[Missouri has] no requirement that a prospective juror demonstrate that he is qualified to serve as foreperson in a capital

trial.” *State v. Kreutzer*, 928 S.W.2d 854,866 (Mo.banc1996). Nevertheless, this Court recently held that an unequivocal statement that a juror could not sign the death verdict alone disqualifies her. *State v. Smith*, No. 82000, slip at13 (Mo.banc 12/5/2000). This is not the law, and it stacks the deck against Missouri’s capital defendants. *Witherspoon v. Illinois*, 391 U.S. 510,523 (1968); *Gray v. Mississippi*, 481 U.S. 648,658 (1987).

Smith, supra, states that an inability to serve as foreperson “hints at an uncertainty” about the juror’s ability to consider both punishments. *Id.* This contravenes *Witherspoon* and its progeny. A *hint* of uncertainty may warrant a peremptory strike, but it doesn’t meet the constitutional standard for disqualification. Opposition to the death penalty “hints at an uncertainty,” too, but not even “*all who oppose the death penalty are subject to removal for cause....*” *Lockhart v. McCree*, 476 U.S. 162,176 (1986)(added). Jurors opposing the death penalty are qualified *if* they can temporarily suspend their opposition in deference to their oath. *Id.*

Disqualifying Morgan because her conscientious inability to be foreperson “hints at an uncertainty” is akin to removing a juror because she would be “affect[ed]” by the possibility of a death sentence. To remove the latter juror would be unconstitutional since the juror’s views merely indicated that she “would view [her] task ‘with greater seriousness and gravity.’” *Adams v. Texas*, 448 U.S. 38,49 (1980). Such affected jurors are neither unwilling, nor unable to follow the law or abide by their oath. *Id.* Likewise, a juror who merely could not be foreperson is not unwilling or unable to follow the law or abide by her oath. She simply acknowledged that she would view her task with great seriousness and gravity.

In *Gray*, Juror Bounds “[could not] make up her mind,” she “[was] totally indecisive ... say[ing] one thing one time and one thing another.” *Gray*, 481 U.S. at 655, n.7. However, “she ultimately stated that *she could consider the death penalty* in an appropriate case....” *Id.* at 653 (added). Bounds’ “somewhat confused” answers “hint[ed] at an uncertainty,” and she might not have been a very helpful juror for the State. But that *did not disqualify* her! “[She] was *clearly qualified* to be seated as a juror under the *Adams* and *Witt* criteria.” *Id.* at 659 (added).

“[T]he decision whether a man lives or dies must be made on scales that are not deliberately tipped toward death.” *Witherspoon*, 391 U.S. at 521-522, n.20. General objections to the death penalty or conscientious and religious scruples against it do *not* disqualify jurors. *Id.* at 521-523. After all, capital juries have vast discretion to decide whether and when death is “the proper penalty.” *Id.* at 519. Jurors’ general views about the death penalty inevitably contribute to this decision. *Id.* And “[a] man who opposes the death penalty, *no less than one who favors it*, can make the discretionary judgment entrusted to him by the State and can thus *obey the oath* he takes as a juror.” *Id.* (added). By removing a juror who can set aside her dislike and consider the death penalty, the State “crosse[s] the line of neutrality.” *Id.* at 520. “No defendant can constitutionally be put to death at the hands of a tribunal so selected.” *Id.* at 522-523.

“The State’s power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would ‘frustrate the State’s legitimate interest in administering constitutional capital sentencing schemes *by not following their oaths*.” *Gray*, 481 U.S. at 658, *quoting Witt*, 469 U.S. at 423 (added). Morgan would have

followed her oath, and that is all that is required of her. *Smith's* “hints at an uncertainty” standard is at odds with every United States Supreme Court decision applying *Witherspoon*. Like, *Alderman v. Austin*, 663 F.2d 558,563 (5th Cir.1981), this Court should “reject the State’s suggestion that service as foreperson is among every juror’s duties.” A given juror’s willingness to serve as foreperson is immaterial to her qualification under *Witherspoon*. *Id.*

Morgan was not disqualified under *Witt, supra* at 416, and *Gray, supra* at 668. Bobby’s right to an impartial jury was denied by the court’s disqualifying Morgan. And this structural error cannot be discarded as harmless. *Gray*, 481 U.S. at 668. This Court must reverse Bobby’s death sentences and remand for a new penalty phase.

XII.

The trial court abused its discretion in letting AAG Smith divert the jurors with wholly inappropriate matters during her guilt and penalty arguments and plainly erred in not declaring a mistrial, *sua sponte*, to correct the grossly improper arguments because such rulings caused a manifest injustice and deprived Bobby of due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§10,18(a),21; Rule 30.20.

Guilt Phase

- (a) Smith warned jurors that they would have to explain any verdict less than first degree murder because that verdict would insult Sondra and**

Amanda;

Penalty Phase

- (b) Smith invited the jury to base its decision on passion and prejudice rather than reason, crying and telling the jury, “[E]motion is fair;”**
- (c) Smith gave unsworn testimony that Bobby’s death “would be a thousand times more humane ... than the death[s] of Sondra...[and] Amanda;” and**
- (d) Smith diminished the jurors’ sense of responsibility, telling them that they were not deciding Bobby’s “ultimate fate” and they were not the “ultimate say.”**

Death is different. *Woodson v. North Carolina*, 428 U.S. 280,305 (1977). When death is at stake, no room exists for caprice and emotion; reason must prevail. *Booth v. Maryland*, 482 U.S. 496,508 (1987); §565.035.3(1).

To avoid caprice and emotion, prosecutors must remain impartial. *State v. Storey*, 901 S.W.2d 886,901 (Mo.banc1995). After all, they share the trial court's obligation to ensure that the defendant receives a fair trial. *State v. Tiedt*, 206 S.W.2d 524,526 (Mo. banc1947); *State v. Salitros*, 499 N.W.2d 815,817 (Minn.1993). The judge must serve as the "administrator of justice"—while the prosecutor serves as the "minister of justice." *Salitros, supra*; Rule 4-3.8, Comment. When the prosecutor steps out of this role and injects prejudice into her arguments, the fairness of the evidentiary phase is irrelevant. *Tiedt, supra* at527. This Court has long warned prosecutors against "injecting into the minds of the jury any matter which is not proper for their consideration, or which would add to the prejudice which the charge itself has produced in their minds." *Tiedt*, 206 S.W.2d at 527, *citing State v. Horton*, 153 S.W. 1051,1054 (Mo.1913). Although courts have wide discretion in controlling closing arguments, they have no discretion to allow plainly unwarranted and injurious arguments. *Tiedt, supra*. Indeed, they must act *sua sponte* to remove such prejudice. *State v. Roberts*, 838 S.W.2d 126, 131 (Mo. App., E.D. 1993); *also* I ABA Standards for Criminal Justice, Special Functions of the Trial Judge 6-1.1 (2 ed.1979). By letting the State divert the jury with wholly unwarranted arguments, the trial court violated Bobby's state and federal rights to due process, a fair trial before a fair and impartial jury and freedom from cruel and unusual punishment.

(a) Smith warned jurors that they would have to explain any verdict less than first degree murder because that verdict would insult Sondra and Amanda

Representing the sovereign, Smith was a servant of the law. *Berger v. United States*, 295 U.S. 78,88 (1935). She was supposed to be interested in serving justice, not winning her case. *Id.*; *Storey, supra*. Ignoring this, Smith sought a win at any cost. She intimidated the jurors, suggesting they would have to explain themselves if they returned a verdict less than first degree murder:

[D]id whoever killed them intend and deliberate and plan to kill them? The only answer to that is absolutely yes. That is why any conviction for [something] other than Murder in the First Degree is an insult to Sondra and to Amanda. They deserve a conviction for Murder in the First Degree.

(Tr.1817). This was “unwarranted and unwise.” *State v. Thomas*, 780 S.W.2d 128,135 (Mo. App.,E.D.1989). Nonetheless, Smith reiterated, “The Defendant is guilty of Murder in the First Degree as to Sondra Mayes and he is guilty of Murder in the First Degree as to Amanda Perkins. Anything less is an insult.” (Tr.1824). Counsel’s objection to the first argument was overruled and included in the motion for new trial (L.F.433), but no objection was made when Smith repeated her message. If left uncorrected, manifest injustice will result. Rule 30.20.

In *Thomas*, the prosecutor told jurors if they acquitted Thomas they would have to explain themselves to family and friends. *Id.* at133-135. This did not simply ask the jurors to discredit Thomas’ defense; rather, it unwisely told jurors that they would have to explain their verdict. *Id.* at134. Indeed, the *Thomas* Court warned prosecutors to avoid

this sort of rhetoric because "it offers an unnecessary, *substantial* claim of error to the defendant." *Id.*(added). Smith ignored this warning, and by overruling counsel's objection, the court gave its imprimatur to this substantial claim of error. *See State v. Taylor*, 944 S.W.2d 925,937 (Mo.banc1997). This Court should reverse.

(b) Smith invited the jury to base its decision on passion and prejudice rather than reason, crying and telling the jury, "[E]motion is fair;"

"[I]t is improper to urge the jury to impose the death penalty based on emotion, not reason." *Taylor*, 944 S.W.2d at937. Indeed, Smith's office admitted thisrule in *Taylor, supra*. Ignoring this, Smith set-out to emotionally charge Bobby's jury. She began by giving the jury permission to be emotional,

It's been awhile since we've seen this picture.⁵ This isn't about emotion, *but emotion is fair*. We have not had a chance to hear from Sondra and we haven't had a chance to hear from Amanda. For close to a week and a half, we've been able to sit in the same courtroom as Bobby Mayes. They weren't here. Do not forget for a second that this case is as much about justice for [them] as it ever was for Bobby Mayes.

(Tr.2001)(added). Defense counsel did not object to this, but, if left uncorrected, this argument will cause a manifest injustice. Rule 30.20. Moments later, Smith cried while telling the jury to look at the collage of Amanda's stab wounds (Tr.2003-2004). The

⁵ Apparently referring to Ex.43h, a collage of Amanda's wounds (*see* Tr.2001-2004).

court overruled counsel's objection, again lending its imprimatur to Smith's emotional ploy (Tr.2004; L.F.442).

Smith did not tell Bobby's jury to show its "outrage" as in *Taylor, supra* at 937. But, just like *Taylor*, she invited the jurors to put their "emotion into it." *Id.* She improperly pleaded for the jury to abandon reason and to decide whether Bobby should live or die based on passion. *State v. Rhodes*, 988 S.W.2d 521,528 (Mo.banc1999). "[I]nflammatory arguments are always improper if they do not in any way help the jury to make a reasoned and deliberate decision to impose the death penalty." *Id.* Indeed, this Court must always correct a sentence of death that "was imposed under the influence of passion, prejudice, or any other arbitrary factor...." §565.035.3(1). These were.

(c) Smith gave unsworn testimony that Bobby's death "would be a thousand times more humane ... than the death[s] of Sondra...[and] Amanda"

Smith presented no evidence during penalty phase regarding Missouri's execution procedure (Tr.1896-1900,1931-1998). She waited until her closing argument and provided her own, unsworn testimony that "Any execution of Bobby Mayes would be a thousand times more humane...." (Tr.2001-2002). Counsel's immediate objection was overruled, and Smith continued, over two more objections, "A thousand times more humane than was given—than the death of Sondra Mayes. The execution of Bobby Mayes would be a thousand times more humane than the death Amanda Perkins suffered." (Tr.2002; L.F.442). Smith's unsworn testimony suggested that Bobby's death would be "quick, painless, and humane." *Antwine v. Delo*, 54 F.3d 1357,1361 (8th Cir.

1995). And, as before, the court placed its imprimatur on this grossly inflammatory argument. *Taylor, supra*.

In *Storey, supra* at 900, the prosecutor argued that case was “about the most brutal slaying in the history of this county.” *Id.* There was no such evidence, and the argument “turn[ed] the prosecutor into an unsworn witness not subject to cross-examination.” *Id.* at 901. It was “highly prejudicial” since jurors properly perceive prosecutors as having a duty to serve justice, thus lending a cloak of credibility to their unsworn testimony. *Id.*

In *State v. Smith*, No. SC82000, slip op. 29-30 (Mo. banc 12/5/2000), this Court addressed Smith’s nearly identical argument. But there Smith’s argument rebutted defense counsel’s plea for mercy. *Id.* That is *not* what happened here. Here, she began her unsworn testimony on the tenth line of her *opening* argument (Tr. 2001, lines 16-25). On appeal in *Smith*, AAG Smith’s colleague claimed that this argument was “simply rhetorical flourish” (*Smith*, No. 82000, St. Br. 50).⁶ Such repeated rhetoric is indefensible.

“Lethal injections are...the most botched means of execution—defined to include unanticipated problems or delays that caused or could have caused, unnecessary agony for the prisoner and/or witnesses.” Borg & Radelet, *Botched Lethal Injections*, NLADA (1998).⁷ Six percent of the executions by lethal injection are botched (fifteen total), including seven in Texas, two in Illinois and one each in Arkansas, Indiana, *Missouri*, Oklahoma, South Carolina and Virginia. *Id.* Indeed, in nine executions, the condemned

⁶ Appellant asks that this Court judicially notice *State v. Smith*, No. 82000.

⁷ <http://www.nlada.org/caprep/ma98/botch.htm>

person endured from thirty minutes to an hour of suffering before the chemicals finally killed them. *Id.*

In Missouri, the Executioners strapped Emmitt Foster too tightly to the gurney, stopping the circulation of the chemicals. *Id.* Mr. Foster endured **thirty minutes** of “gasping and convulsing” before he was finally pronounced dead. *Id.* He suffered such anguish that the Executioners closed the curtains so witnesses would not have to watch. *Id.* The other fourteen botched executions are equally depraved and vile.

Smith’s unsworn testimony disguised as argument cannot be tolerated. The harm in Smith’s “rhetorical flourish” is that “the jurors, faced with a very difficult and uncomfortable choice, will minimize the burden of sentencing someone to death by comforting themselves with the thought that the death would be at least instantaneous, and therefore painless and easy.” *Antwine*, 54 F.3d at 1362. Smith’s assurance to the jurors was grossly misleading.

(d) Smith diminished the jurors’ sense of responsibility, telling them that they were not deciding Bobby’s “ultimate fate” and they were not the “ultimate say.”

“[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.” *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985). Nonetheless, Smith diminished the jurors’ sense of responsibility. As she began her final penalty closing, she proclaimed

MS. SMITH: The ultimate fate of Bobby Mayes is not at issue today. That’s wrong. What is at issue today is what justice is going to be given to Sondra Mayes

and Amanda Perkins. That's what's at issue. The ultimate fate of Bobby Mayes has yet to be decided. A vote for the death penalty in this case is not a vote about where Bobby Mayes will spend his days. It is a vote about what is right and what is wrong. It's not the ultimate say.

MS. O'NEILL: Objection, Your Honor. Improper argument.

THE COURT: Excuse me. I didn't hear the comment.

MS. SMITH: I said it's not the ultimate say.

THE COURT: Excuse me. That is improper. The jury is admonished to disregard that fact that it's the ultimate say. Yours is the ultimate say.

(Tr.2021-2022).

“[Smith's] argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell*, 472 U.S. at 323, *citing Woodson v. N.C.*, 428 U.S. 280, 305 (1976)(plurality). And, worse, she repeated it as the court ruled Bobby's objection. The court's subsequent instruction for the jurors to disregard the improper argument did not to remove it from their minds. The court may as well have told a young boy not to put beans up his nose. *Fleming v. State*, 240 S.E.2d 37, 40 (Ga.1977). In *Fleming*, the prosecutor diverted the jury from its sentencing duty by referring to the appeal process. *Id.* Upon objection, the trial court ruled, “All right, that would not be proper and I'd instruct the jury to disregard that.” *Id.* The Georgia Supreme Court reversed because this curative instruction was too “minimal” to remove the prejudice. *Id.*

Drastic errors call for drastic remedies, and a mistrial should be granted when the prejudice cannot be removed any other way. *State v. Schneider*, 736 S.W.2d 392,400 (Mo.banc1987). This is such an error. “[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.” *Caldwell*, 472 U.S. at329. This Court must reverse, lest it will permit a manifest injustice go uncorrected. Rule.30.20.

XIII.

The trial court abused its discretion in overruling Bobby’s objection and letting Cora Wade testify about Sondra’s hearsay statements because such ruling deprived Bobby of due process, confrontation, a fair trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§ 10,18(a),21. Wade’s testimony that Sondra said she had told Bobby she “wasn’t intending to testify for [him],” but that she might testify if he signed the waiver of marital assets merely recounted past events; and her testimony that Sondra said Bobby had signed the waiver, but she had not worked up the courage to tell him that she still was not testifying for him did not prove Sondra’s state-of-mind. Indeed, Bobby did not claim accident, suicide or self-defense, thus he did not put Sondra’s state-of-mind in issue. Furthermore, the State used Wade’s testimony to prove the truth of the matters asserted.

Bobby was preparing for an August 11, 1998 trial for “sex charges” (Tr.1333; Point VI,*supra*)—those charges were subsequently dismissed. Sondra and Amanda were endorsed to testify for him, but Bobby supposedly told Snitch Cook that Sondra had decided not to testify (Tr.1182,1333-1334; Point V,*supra*). In guilt phase, the State clung to this “one possible reason” for Bobby to kill Sondra and Amanda (Tr. 934). Having to disprove a negative, Bobby could only call Fred Martin—his attorney from that case who had no information “whatsoever” that Sondra and Amanda had changed their minds (Tr.1788). In penalty, the State knew it could not rest on Cook’s flimsy story. It needed Cora Wade, whose hearsay testimony had been excluded previously (Tr.987-988,1872).

Sondra's out-of-court statements to Wade cannot be offered through Wade to prove their truth. *State v. Shurn*, 866 S.W.2d 447,457 (Mo.banc1993). Statements that reflect a victim's present state-of-mind, however, are excepted from the hearsay ban if their probative value outweighs their prejudicial effect. *State v. Bell*, 950 S.W.2d 482,483 (Mo.banc1997). Relying on this exception, the trial court overruled Bobby's hearsay objection (Tr.1872-1873,1987-1988; L.F.440). The court abused its discretion and violated Bobby's state and federal rights to due process, a fair trial, and freedom from cruel and unusual punishment and to be tried only for the charged offenses.

Bobby did not put Sondra's state-of-mind in issue

A victim's state-of-mind is irrelevant *unless* the defendant places it in issue by claiming "accident, self-defense or suicide." *Id.* For example, in *Bell*, the defendant claimed that the victim attacked him and set herself ablaze during a struggle. *Id.* at483. Clearly, *Bell* put the victim's state-of-mind in issue. Bobby did not. He did *not* claim accident, self-defense or suicide. Sondra's state-of-mind was not in issue, and admitting Wade's testimony violated the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. 56 (1980).

Wade's testimony did not show Sondra's state-of-mind

Assuming *arguendo* that Sondra's state-of-mind was relevant, Wade's testimony, like the witness' in *Bell* simply did not fit within the exception. Wade testified about two conversations with Sondra:

She testified that, about four days before her death, Sondra said "she wasn't intending to testify for [Bobby] and she had told him so." (Tr.1991). Wade added that

Sondra said she told Bobby that “she might testify after—if he signed the waiver.” (Tr.1991). This is nearly identical to testimony this Court condemned in *Bell, supra*. There, a witness testified that the victim had “said that Mr. Bell had beaten her on numerous occasions.” *Id.* at 484. This statement merely recounted a past event. It did not fit within the exception because it was not a contemporaneous statement of fear, emotion, or other mental condition. *Id.* This Court reversed Bell’s conviction, as it must reverse Bobby’s death sentences. Sondra’s hearsay statements to Wade merely recount past events. They expressed no mental condition that she was then experiencing, and Wade’s description that Sondra was very upset during this conversation (Tr. 1991) is irrelevant. To show *Sondra’s* state-of-mind, the statement must be accompanied by *Sondra’s* assessment of her emotional state.

Wade also testified that the day Sondra was killed she Bobby had signed the waiver of marital assets, “but she had not been able to work up the courage to tell him that she still wasn’t going to testify for him.” (Tr. 1992). Wade again added her assessment that Sondra was “[d]etermined—upset.” *Id.* It is impossible to know what Sondra meant about needing courage to tell Bobby. She may have meant simply that Bobby was counting on her and she regretted letting him down. The fact is, she expressed no emotion, fear or other mental condition. That expression was filtered through Wade, which illustrates the problem with hearsay. Hearsay is objectionable precisely because the declarant is not under oath, subject to cross-examination. *State v. Robinson*, 484 S.W.2d 186,189 (Mo.1972). Sondra’s state-of-mind must be provided by

her, not by Wade. The trial court turned the state-of-mind exception on its head. It abused its discretion.

Bobby did not open-the-door to this inadmissible hearsay

At trial, the State hid behind the idea that Bobby opened-the-door to Wade's hearsay testimony by calling Fred Martin to testify in guilt phase (Tr.1872). This is ridiculous. The State elicited from its snitch that Bobby allegedly said he killed Sondra because she told him she wouldn't testify. Bobby had to call Fred Martin—and consequently waive attorney/client privilege—to answer the State's evidence. *See Gardner v. Florida*, 430 U.S. 349,362 (1977); *Simmons v. South Carolina*, 512 U.S. 154, 161 (1994). By doing so, he tried to close the door the State cracked; he certainly did *not* open-the-door to inadmissible hearsay. *State v. Debler*, 856 S.W.2d 641,649 (Mo.banc 1993)(mere reference to existence of a statement did not open-the-door to justify admitting it); *Kipp v. State*, 876 S.W.2d 330,337 (Tex.Crim.App.1994) (opening-the-door to otherwise inadmissible evidence does not invite hearsay). Bobby did not open the door to Wade's hearsay. The State cannot play this game of "legal gotcha." *Schneider v. Delo*, 85 F.3d 335,339 (8th Cir.1996).

Wade's testimony prejudiced Bobby

A trial court's abuse of discretion requires reversal when prejudice results. *Bell, supra* at 484. No prejudice results when other evidence establishes the same thing as the improper evidence. *State v. Martinelli*, 972 S.W.2d 424,436 (Mo.App.,E.D. 1998). Wade's hearsay testimony cannot be dismissed as merely cumulative to Cook's. Cook is an inherently unreliable snitch. (Point V,*supra*). Furthermore, the State used Wade's

testimony to prove its truth—that Sondra had decided not to testify and that she told Bobby. AAG Smith argued that Bobby “couldn’t even tell his own lawyer his wife wasn’t going to testify for him.” (Tr.2009). Only Wade’s hearsay testimony supported this argument. Not the deputy clerk’s—she simply said that Sondra and Amanda were endorsed (Tr.1333-1334). And not Cook’s—he simply alleged that Bobby killed Sondra during an argument about her decision not to testify (Tr.1181-1182). The only testimony to support the hypothesis that Bobby knew about Sondra’s “decision” not to testify in time to communicate it to Martin was Wade’s.

A reasonable probability exists that, but for Wade’s testimony, the verdict would have been different. *Bell, supra*. This Court must reverse.

XIV.

The trial court abused its discretion in overruling Bobby's objections and letting the State impugn Bobby's character with irrelevant evidence and speculation because those ruling deprived Bobby of due process, a fair trial before a fair and impartial jury, freedom from cruel and unusual punishment and to defend himself against the charged offenses. U.S.Const., Amends. V,VI,VIII, XIV; Mo.Const., Art.I, §§10,17,18(a),21. Although Bobby did not testify—and thus did not put his character in issue, the State elicited from (a) Edna Yarnell, who lived next door, that she heard Bobby and Sondra argue 4-5 times so she started keeping her patio door closed and (b) Chief Kirkman that Bobby said his employer had “let him go.” If left uncorrected, this error will cause manifest injustice since character evidence weighs so heavily with jurors as to overpersuade them.

Bobby did not put his character in issue; indeed, the State beat him to the punch. It impugned his character with just its fourth witness-Edna Yarnell, and it renewed its attack with its nineteenth witness-Chief Kirkman (Tr.IV-V,VIII-IX,998-1000,1429-1430). This was grossly unfair. A defendant's character is off-limits unless *he* first puts it in issue by offering evidence of his good character *State v. Milligan*, 654 S.W.2d 304,309 (Mo.App.,W.D.1983). This isn't because the law presumes his character to be good, but because his character is simply irrelevant until he injects it. *Old Chief v. U.S.*, 519 U.S. 172,181 (1997). The door is locked on the matter during the State's case-in-chief because “it is said to weigh too much with the jury and to so overpersuade them as

to prejudge one with a bad general character and deny him a fair opportunity to defend against a particular charge.” *Id.*

Nonetheless, the State attacked Bobby’s character:

Edna Yarnell lived next door to Bobby and Sondra (Tr.996-997). Lining up for its attack, the State asked if Yarnell could “ever hear” Bobby and Sondra “from next door where [her] house was” (Tr.998). Over Bobby’s relevancy objection, Yarnell testified that she “could hear them...when my patio doors were open and their door was opened.” (Tr.998-999). Over Bobby’s speculation objection, Yarnell agreed that she could hear Bobby and Sondra argue (Tr.999). After hearing 4-5 arguments, Yarnell “began closing [her] door so [she] couldn’t hear it.” (Tr.1000).

Later, the State used Chief Kirkman to renew its attack on Bobby’s character (Tr.IV-VIII). Over Bobby’s relevancy objection, Kirkman testified, “[Bobby] told me that he had been working for a pavement company in—a paving company in Springfield, but unknown to [Sondra], they had let him go.” (Tr.1429-1430).

The State relied on similarly improper evidence in *Milligan*, 654 S.W.2d at 208, eliciting that Milligan was a violent drunk. The court sustained most of Milligan’s objections and even gave cautionary instructions, but it let one witness describe Milligan as “mouthy, pushy, and wanting to fight everyone” when he drank liquor. *Id.* Milligan objected that this was irrelevant. *Id.* Since Milligan had not offered evidence of his good character, the Western District agreed and reversed for a new trial. *Id.* at209.

This Court should do the same. The State deliberately impugned Bobby’s character. That Bobby and Sondra argued—however many times—was wholly

irrelevant. All couples argue. But the State ignored this reality, painting Bobby as a violent husband by adding to the equation that Yarnell felt compelled to keep her door closed. Clearly, this implied that the arguments were violent and that Bobby was a man of bad character. Not satisfied with this image, the State then portrayed Bobby as a lazy man who could not hold a job. Again, this proved nothing.

Missouri courts have long cautioned prosecutors against injecting into the minds of the jury any matter that fans the flames of prejudice. *State v. Tiedt*, 206 S.W.2d 524, 526 (Mo.banc1947). Indeed, prosecutors share the judge's duty to give defendants a fair trial. *Id.* That did not occur here. Instead, they injected prejudice of the most weighty variety—bad character. And, although the court had discretion to admit evidence for the jury, it did not have unfettered discretion. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo.banc1993). Indeed, it had no discretion to admit evidence “to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief*, 519 U.S. at 180. Its rulings here violated Bobby's state and federal rights to due process, a fair trial before a fair and impartial jury, freedom from cruel and unusual punishment and to be tried only for the charged offenses.

That Bobby and Sondra argued and that he lost his job simply lured the jury away from the facts pertinent to the charges, inviting it to convict and sentence Bobby based on the State's aspersion that he is a man of bad character. By overruling Bobby's objections to this irrelevant and speculative evidence, the trial court gave its “stamp of approval” and increased the likelihood that the jury would be diverted. *See State v. Taylor*, 944 S.W.2d 925, 938 (Mo.banc1997). This Court should reverse Bobby's convictions.

XV.

The trial court plainly erred in letting Dr. Hausenstein testify that Bobby offered no exculpatory explanation for the marks on his hands because such action deprived Bobby of due process, silence, counsel and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),19,21. Police used Dr. Hausenstein as their agent to investigate marks on Bobby's hands, and did so without Bobby's attorney, Fred Martin, being present. Martin was defending Bobby on pending "sex charges," which were set for trial the day after these murders. That sex case gave the State "one possible" motive and two potential aggravators for these murders, thus making Bobby's right to counsel in the sex and murder cases so inextricably intertwined that it could not be severed. If left uncorrected, this error will cause manifest injustice.

On August 10, 1998 Sondra and Amanda were killed. Bobby found Sondra lying on their bedroom floor and called 911 (Tr.1018-1022). Texas County Prosecutor Garrabrant called Police Chief Kirkman at the scene, and Kirkman went outside and arrested Bobby (Tr.1400). Garrabrant was set to take Bobby to trial on "sex charges" the next day, and Sondra and Amanda had been endorsed to testify for Bobby (Tr.1333-1334). Though Bobby's attorney, Fred Martin, still expected them to be defense witnesses, Sondra may have decided not to testify (Tr.1181-1182,1991-1992). Indeed, according to the State, "[Sondra] changed her mind and [Bobby] killed her because he was angry over it" (Tr.1815; *also* Tr.934).

Upon learning of Bobby's arrest, Martin went to the Texas County Jail and conferred with Bobby (Tr.1789). Late that night, Sgt. Johnson decided to have someone look at "suspicious" lacerations on Bobby's hands, and he called Dr. Hausenstein to the jail (Tr.1522). Upon arriving at the jail, Dr. Hausenstein met with Johnson and Garrabrant and "was taken to a room where Bobby was." (Tr.1307-1308). Martin was not present, and admitting this evidence violated Bobby's state and federal rights to due process, silence, counsel and freedom from cruel and unusual punishment.

The Sixth Amendment is "offense specific," attaching when formal proceedings have begun. *McNeil v. Wisconsin*, 501 U.S. 171,175-176 (1991). Ordinarily, it does not preclude police-initiated contact regarding "new...crimes." *Maine v. Moulton*, 474 U.S. 159,179 (1985). But nearly every court⁸ to address *Moulton* has concluded that, once attached, the Sixth Amendment right also attaches to new charges "inextricably intertwined" with the original case. *U.S. v. Doherty*, 126 F.3d 769,776 (6th Cir.1997), citing *U.S. v. Arnold*, 106 F.3d 37,41 (3rd Cir.1997); *U.S. v. Kidd*, 12 F.3d 30,33 (4th Cir.1993); *U.S. v. Cooper*, 949 F.2d 737,743-744 (5th Cir.1991); *U.S. v. Mitcheltree*, 940 F.2d 1329,1342-1347 (10th Cir.1991); *U.S. v. Rodriguez*, 931 F.Supp. 907,926-927 (D.Mass.1996); *People v. Clankie*, 540 N.E.2d 448 (Ill.1988); also *Whittlesey v. State*, 665 A.2d 223 (1995); *State v. Tucker*, 645 A.2d111,120-125 (N.J.1994).⁹

⁸ Appellant's research has disclosed no Missouri case squarely addressing this issue.

⁹ This U.S. Supreme Court heard this issue 1/16/01. *Texas v. Cobb*, NO. 99-1702.

Once attached, the Sixth Amendment prohibits the State from deliberately obtaining evidence from a suspect unless counsel is present. *McNeil, supra*. It places on the State the “affirmative obligation” to “respect and preserve” a suspect’s choice to communicate through counsel. *Moulton*, 474 U.S. at 170-171. The State cannot circumvent or dilute the Sixth Amendment. *Id.* Here, it did.

These murder charges are “inextricably intertwined” with the pending “sex charges.” These murder victims were witnesses for the “sex charges” trial. Cases do not get more intertwined than this. *Arnold, supra*. Arnold stole from his employer and confided to his fiancé. *Id.* at 38-39. Fearing that she would report him to the FBI, Arnold told two men he would pay to have his fiancé killed. *Id.* at 39. Motivated by greed, one of these men went to the FBI, and the government got a sealed indictment for bank theft, money laundering and witness intimidation. *Id.* It then had an agent meet with Arnold, and Arnold renewed his desire to have his fiancé killed. *Id.* The government then charged Arnold with attempted murder. *Id.* That count was “inextricably intertwined” with the witness intimidation. Arnold’s conviction was reversed because both charges related to Arnold’s attempt to avoid being caught on the theft and laundering, and his willingness to kill a witness to accomplish that. *Id.* at 42. This is equally true here. The State theorized that both cases against Bobby related to Bobby’s desire not to be caught on the pending “sex charges”¹⁰ and his willingness to kill witnesses who stood in his way.

The Fourth Circuit takes the analysis one-step further, asking whether the illegal contact produced “incriminating evidence as to the previously charged offenses.” *U.S. v.*

Melgar, 139 F.3d 1005,1015 (4th Cir.1998). Melgar, an illegal alien, was arrested and charged—in state court—with possessing (1) a concealed weapon, (2) marijuana and (3) a fake government identification. *Id.* at1008-1009. Two days later, an INS agent questioned Melgar to determine his “alienage and deportability.” *Id.* at1009. After Melgar posted bond on his state charges, the federal prosecutors charged him with possession of a firearm by an illegal alien. *Id.* The state and federal charges were “closely related.” *Id.* at1011-1015. The INS agent had consulted with the state police and knew that Melgar’s arrest stemmed from the fake ID. *Id.* at1015. “[He] like the officers in *Moulton*, must have known that he was likely to obtain incriminating statements from Melgar.” *Id.* He also obtained incriminating evidence regarding the state charge. *Id.* at1015. He elicited that Melgar had been in the country illegally for 13 months, thus providing Melgar’s motive for the state charge of obtaining a fake ID. *Id.* The Fourth Circuit reversed. *Id.* at1016.

Here, Dr. Hausenstein consulted with the prosecutor from the pending “sex charges.” Garrabrant knew that Sondra and Amanda were endorsed witnesses for Bobby in that “sex” case; he must have known that incriminating evidence would result from this uncounseled contact. And it did. Hausenstein meticulously diagramed the cuts and discoloration on Bobby’s hands (Tr.1309-1314; Exs18a,18b,18c,18d). The injuries were consistent with “a constriction across part of the hand...[lasting] a minute to minutes.” (Tr.1316). Nonetheless, Hausenstein “wasn’t sure if they were *birth marks*” because “[Bobby had] offered no explanation as to how they got there (Tr.1320)(added). He

¹⁰ The State ultimately dismissed these.

arranged to reexamine Bobby on August 12th (Tr.1320). Then, he opined that the cuts resulted from “something wrapping around [Bobby’s] hands ...[a]nd putting pressure in that area.” (Tr.1324). Hausenstein added that such “constriction” injuries require tremendous force (Tr.1325).

Johnson, Garrabrant and Hausenstein obtained incriminating evidence for both the murder and sex case.

As to the murder case, they got evidence linking Bobby to Amanda’s death. Until this uncounseled contact, they only had suspicions that the marks on Bobby’s hands correlated to the mark on Amanda’s neck. Afterward, they had Hausenstein’s opinion that Bobby’s injuries were caused by a tremendous constrictive force. They also got Hausenstein’s testimony that Bobby did not explain how he got injured. Eliciting this was grossly improper. *State v. Stuart*, 456 S.W.2d 19,22 (Mo.banc1970). Indeed, showing that a defendant failed to volunteer an exculpatory explanation amounts to plain error, causing manifest injustice. *State v. Dexter*, 954 S.W.2d 332,335-343 (Mo.banc 1997).

As to the “sex” case, the State got evidence strongly suggesting Bobby’s consciousness of guilt. *See Arnold, supra; Lovett v. State*, 516 A.2d 455,468-469 (Del.1986)(“A defendant’s efforts, during a pending prosecution, to influence or alter the testimony of a prospective witness is relevant to the issue of consciousness of guilt.”).

Waiting until Bobby’s attorney on the “sex charges” had left the jail, the State deliberately circumvented Bobby’s Sixth Amendment right to counsel. It then obtained damning evidence against Bobby on both cases. This Court must reverse. Although

defense counsel did not object, this fundamental constitutional error will cause manifest injustice if left uncorrected. Rule 30.20.

XVI.

The trial court erred in overruling Bobby’s objections, finding that the convictions reflected in Exs.49,50 were “serious assaultive,” and refusing to submit that fact to the jury because these actions deprived Bobby of due process, a jury trial and freedom from cruel and unusual punishment. U.S.Const., Amends. V,VI, VIII,XIV; Mo.Const., Art. I, §§10,18(a),21. First degree murder is punishable by life without parole *unless* an aggravating fact is proved beyond a reasonable doubt, then it is punishable by death. Whether Bobby had two prior convictions for first degree sexual abuse and one for second degree robbery was a fact for the trial court. But whether those convictions were “*serious assaultive*” was a fact for the jury.

The State charged Bobby with two counts of first degree murder (L.F.10,81). The presumptive punishment for which is LWOP. §§ 565.030.4, 565.032.2. To enhance the punishment to include the possibility of death, the State must allege and prove a statutory aggravator beyond a reasonable doubt. *Id.* Such proof must be made to the jury. *Jones v. U.S.*, 526 U.S. 227,243,n.6 (1999); *Apprendi v. N.J.*, 530 U.S. 466 (2000). The lone exception allows the court to find, as a matter of law, that a prior *conviction* exists. *Id.*

Here, the State alleged Bobby had “one or more serious assaultive criminal convictions” aggravator (L.F.12,14, *citing* §565.032.2(1)). In support, the State offered Exhibits 49,50, showing that Bobby has two *prior convictions* for first degree sexual abuse and one for second degree robbery. The existence of these convictions is all that the State proposed the jury decide:

Instruction No. 26/31

In determining the punishment to be assessed under Count [I/III] against the defendant for the murder of [Sondra Sutton Mayes/Amanda Perkins], you must first unanimously determine whether one or more of the following statutory aggravating circumstances exist:

1. Whether the defendant was convicted of sexual abuse in the first degree on January 12, 1978, in the Circuit Court of Graves County of the State of Kentucky.
2. Whether the defendant was convicted of robbery second degree on January 12, 1978, in the Circuit Court of Graves County of the State of Kentucky.
3. Whether the defendant was convicted of sexual assault in the first degree on February 25, 1985, in the Circuit Court of Jefferson County of the State of Kentucky.

* * *

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing statutory aggravating circumstances exist, you must return a verdict fixing the punishment of the

defendant at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

(L.F.384-385,391-392). Defense counsel objected, proposing

Instruction No. I

The State has introduced evidence that the defendant has been previously convicted of the crimes of robbery and sexual abuse. This evidence may be considered by you only for the purpose of determining whether the State has proven the aggravating circumstance that the defendant has one or more serious assaultive convictions beyond a reasonable doubt and the weight to be afforded that aggravating factor, if proven. It may not be considered by you in determining whether the State has proven any other statutory aggravating factor beyond a reasonable doubt.

(L.F.403,435,441-442; Tr.1863-1864). Overruling repeated objections, the court decided for itself that these convictions were “serious assaultive,” leaving the jury to decide only the existence of the *prior convictions* (Tr.1863-1864,1879). This was error, violating Bobby’s state and federal rights to due process, jury trial and freedom from cruel and unusual punishment.

This precise issue was raised in *State v. Johns*, No. SC81479, slip op.32 (Mo.banc12/5/2000). There, this Court simply noted that it has “repeatedly held that the determination of whether a prior conviction is a serious assault for purposes of the statutory aggravator, is a matter of law for the court, and the jury need only find as a

matter of fact that a prior conviction actually occurred.” *Id.*, citing *State v. Kinder*, 942 S.W.2d 313,332 (Mo.banc1996). This seriously misstates the law.

The existence of a prior conviction is the *one fact* that the *court* can find. *Jones, supra; Apprendi, supra*. Under this Court’s reasoning in *Johns*, this aggravating circumstance never need be submitted to the jury. The trial court can find this aggravator and then instruct the jury that, “as a matter of law,” the defendant is death-eligible. This contravenes legislative intent. The “serious assaultive” determination cannot be a legal one when the legislature clearly intended that the *jury*, not the judge, determine whether a given defendant is death-eligible. §§565.030.4, 565.032.2. This Court cannot obviate that intent.

Whether convictions are “serious assaultive” require fact-findings. The legislature did not intend for *every* assaultive conviction to enhance the punishment for first degree murder—only those which are *serious*. It similarly dealt with first degree assault, a class B felony *unless* the jury finds it resulted in *serious* physical injury. §565.050.2. The situation here is no different. By stripping Bobby of his right to a jury trial on this issue, the court inflicted a structural defect in the trial mechanism. *Johnson v. Armontrout*, 961 F.2d 748,756 (8th Cir.1992) citing *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). A properly constituted jury is part of the “structural framework” of the trial. *Id.* Its denial can never be dismissed as harmless. *Id.* This Court must reverse.

As the Attorney General repeatedly told the jury, Missouri is a weighing state. (Tr.262,306, 350,405,544,615-616,702). Indeed, the instructions make this clear as well (L.F.388,396); MAI-CR3d 313.46A. Though removing these aggravators from the scales

would have left Bobby *eligible* for death, it remains for a jury to decide whether the new balance would weigh in favor of life or death. “The evaluation of the aggravating and the mitigating evidence offered during the penalty phase is more complicated than a determination of which side proves the most statutory factors beyond a reasonable doubt.” *State v. Storey*, 986 S.W.2d 462,464 (Mo.banc1999); *also Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995)(“Since the jury found only two aggravating circumstances, the *balance* of aggravating and mitigating circumstances in the penalty phase of the trial would have altered enough to create a reasonable probability that the jury would not sentence Antwine to death.”). This Court must order a new penalty phase.

XVII.

The trial court erred in overruling Bobby's objections and admitting his convictions for Indecent/Immoral Practices with Another (Ex.45) and Second Degree Escape (Exs.48,51) because this evidence violated §§ 565.030,565.032 and deprived Bobby of due process, a fair trial and freedom from cruel and unusual punishment. U.S. Const., Amends. V,VI,VIII,XIV; Mo.Const., Art. I, §§ 10,18(a),21. Generally, §565.032.1(3) excluded all criminal convictions, while §565.032 includes only Serious Assaultive Convictions and Murders as statutory aggravators. Exs. 45,48,51 did not support this aggravator and should have been excluded. Admitting them without guiding the jury on how to consider them, prejudiced Bobby.

In 1993, the legislature decided not to burden capital defendants with the admission of convictions that merely portray him as a bad person. It limited admission to Serious Assaultive Convictions and Murders. By overruling Bobby's objections (Tr. 1879-1880,1944-1953; L.F.288-297,440-441), the court let the prosecutor repeal this 1993 legislation, thereby violating Bobby's state and federal rights to due process, a fair trial and freedom from cruel and unusual punishment. The inherent prejudice from this is exacerbated since the jury was not instructed how to consider them.

A. Change in the Statute

Exercising its legislative power, the General Assembly tried to end the days of "anything goes" with respect to admitting prior convictions in penalty phase. But this change has not taken root. *State v. Smith*, No. 82000, slip op.37-38 (Mo.banc 12/5/2000) ("the sentencer should generally receive any and all evidence that aids it in assessing

punishment.”). This Court cannot use this general rule to circumvent the Legislature’s power to change the law, *see* Mo.Const., Art.II, since criminal statutes must be construed liberally in favor of the defendant and strictly against the state. *State v. Treadway*, 558 S.W.2d 646,652 (Mo.banc1977)(overruled on other grounds).

In 1993, the General Assembly exercised its power and changed the general rule:

<u>RSMo 1992</u>	<u>RSMo 1993</u>
§ 565.032.1(3):	§ 565.032.1 (3):
“any aspect of the [D’s] character” and	“any aspect of [D’s] character” and
“the record of any prior...convictions”	“the record of any prior... convictions”
§ 565.032.2(1):	§ 565.032.2(1):
“prior...first degree murder” or	“prior...first degree murder” or
“[prior] serious assaultive...convictions”	“[prior] serious assaultive convictions”

In making these changes, the Legislature intended to change the law, not to waste paper. *State ex rel. Edu-Dyne Systems v. Trout*, 781 S.W.2d 84,86 (Mo.banc1989). It deleted the language that had permitted admission of "any crimes," and this Court must give effect to that change. The courts cannot let the State ignore this statutory change.

B. Specific Statute Controls General Statute

When one statute deals with a subject generally and a second statute deals with a part of that subject specifically, the general yields to the specific. *O’Flaherty v. State Tax Com’n of Missouri*, 680 S.W.2d 153,154 (Mo.banc1984). Consequently, evidence of prior convictions that are not specified as a statutory aggravator, are *not* admissible. *U.S.*

v. Peoples, 74 F.Supp.2d 930,932-34 (W.D. Mo. 1999); *Ford v. Lockhart*, 861 F.Supp. 1447 (E.D.Ark.1994); and *Hill v. Lockhart*, 824 F.Supp. 1327 (E.D.Ark.1993).

In *Peoples, supra*, the prosecutors tried to use burglary convictions that did not constitute the "serious crimes" statutory aggravator. Like our statute, the federal law specifically lets juries consider only a limited range of "death-worthy" convictions. *Id.* at931. Peoples' convictions for stealing, tampering, burglary, receiving stolen property and unlawful possession of a weapon did not fall within the statutory list of "serious crimes," and had to be excluded because of the heightened reliability required in capital sentencing.. *Id.* at931-932; see *Woodson v. N.C.*, 428 U.S. 280,305 (1977). The Court distinguished federal criminal sentencing from death penalty juries:

Tampering and dealing in stolen goods may well alter judicial views as to the number of months a defendant should serve ... They are pernicious distractions, however, in considering whether a defendant shall live or die.

Peoples, 74 F.Supp. at932. When criminal history is given a restricted meaning in the statutory aggravators, "[it] cannot, by any fair reading, be given a second and more abundant life as a nonstatutory aggravator." *Id.* at933-34,n.1.

Missouri's Legislature apparently agreed that convictions that were not Serious Assaultive Convictions or Murder were "pernicious distractions" for capital juries. §565.032.2 (1). The courts cannot permit those distractions to be admitted under the guise of a general rule that "anything goes." After all, "the prejudicial effect of the introduction of the felonies into the jury's deliberation during the penalty phase cannot be underestimated." *Ford*, 861 F.Supp. at1470, quoting *Hill*, 824 F.Supp.at1336.

In *Hill, supra* at 1333-1334, the court granted habeas relief because admission of three non-violent felonies during the penalty phase was prejudicial despite the trial court's cautionary instruction not to consider them in assessing death. *Id.* at 1333-34. Such non-violent convictions merely showed Ford to be a "man of bad character," and that could not be tolerated. *Id.* at 1335

Similarly, Bobby's convictions delineated in Exhibits 45, 48, 51 simply portrayed him as being of bad character. If guilty, as the jury believed, Bobby should be punished, but only for allegedly killing Sondra and Amanda. The State should not be able to make Bobby pay with his life for prior convictions that are irrelevant to any statutory aggravator. Ex. 45 merely bolstered the State's sexual innuendo (Points VII, IX, *supra*), and Exs. 48, 51 merely bolstered its misleading theory that Bobby could not be peaceably contained in prison (Points I, II *supra*). The prejudice, here, is even greater than *Ford* because Bobby's jury was never instructed not to impose death based upon this bad character evidence. See § 565.032 and MAI-CR3d 313.41A Notes on Use (explicitly prohibit the jury's being "instructed upon any specific evidence which may be in aggravation or mitigation of punishment."). This Court must reverse and remand for a new penalty phase.

XVIII.

The trial court erred and plainly erred in submitting the depravity of mind and multiple murder aggravators because doing so deprived Bobby of due process, a properly instructed jury and freedom from cruel and unusual punishment. U.S. Const., Amends. V,VIII,XIV; Mo.Const., Art. I, §§10,21. (A) The State did not prove beyond a reasonable doubt that Amanda’s death involved torture in that the State’s evidence showed the twenty-one stab wounds occurred after Amanda had been rendered unconscious and aspirated her gastric contents from being choked. (B) Both aggravators are unconstitutionally vague since they do not distinguish this case from those where the death penalty is not imposed and do not channel or limit the jury’s discretion, thus resulting in arbitrary and capricious sentencing. If left uncorrected, these errors will cause manifest injustice.

Depravity of Mind

According to the State, Bobby “had [Amanda] down over the side of the bed and he was choking her from behind.” (Tr.1811). Amanda thus aspirated her stomach contents and fell close to death (Tr.1700-1701). The twenty-one stab wounds had to come in rapid succession after the choking (Tr.1678-1694,1701, 1811-1812). After all, “If you can’t breathe, it’s—within three or four minutes you’re dead.” (Tr.1701). Both the aspirated gastric contents and blood loss contributed to her death (Tr.1701).

The jury was asked to find beyond a reasonable doubt that Amanda was tortured with “repeated and excessive acts of physical abuse.” (L.F.391); §565.030.4(1); *Jones v. U.S.*, 526 U.S. 227,243,n.6 (1999); *Apprendi v. N.J.*, 530 U.S. 466 (2000). While the stab

wounds were numerous, they are not enough to support this aggravator. The stab wounds, regardless of their number, could not have caused torture since Amanda, according to the evidence was already unconscious. Without a finding of torture, this aggravator is unconstitutional. After all, without a finding of torture, the depravity of mind aggravator would be constitutional. *State v. Smith*, 756 S.W.2d 493,502 (Mo.banc1988) (Blackmar, J., concurring).

Notably, the jury found that Sondra's death did *not* involve "depravity of mind," though she was clearly conscious and suffered multiple defensive wounds (Tr.1641-1649 L.F.414). This bizarre dichotomy is the product of Missouri's unconstitutionally vague depravity of mind aggravator, which "fails adequately to inform juries what they must find to impose the death penalty." *Maynard v. Cartwright*, 486 U.S. 356,361-362 (1988). The depravity of mind aggravator leaves the jury and the judge "with the kind of open-ended discretion" decried by *Furman v. Georgia*, 408 U.S. 238 (1972). *Cartwright*, *supra* at362.

This aggravator does not minimize the risk of wholly arbitrary and capricious action because it does not limit the jury's discretion. "[O]utrageously or wantonly vile, horrible and inhuman" does not limit a jury's discretion. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Any person could fairly characterize nearly any murder as such. *Id.* Thus, a year after *Cartwright*, the Eighth Circuit held that Missouri's "depravity of mind" aggravator was unconstitutionally vague. *Newlon v. Armontrout*, 885 F.2d 1328, 1334-1335 (8th Cir.1989). Responding to *Cartwright*, this Court tried to draft a "limiting construction" to resurrect the "depravity of mind" aggravator. *See State v. Griffin*, 756

S.W.2d 475,490 (Mo.banc1988). Without finding torture, however, the so-called limitations cure nothing. They simply add such things as repeated/excessive physical abuse or callous disregard for life, which also can be found in nearly any murder. To date, Missouri has merely created the illusion of limiting the jury's discretion. *See* MAI-CR3d 313.40. Without an objective factor, such as torture, this aggravating circumstance poses too great a risk of arbitrary and capricious action, thus violating Bobby's state and federal rights to due process, a properly instructed jury and freedom from cruel and unusual punishment.

Multiple Murders

According to the State, Bobby killed Amanda then "lit [a] candle and sat and waited for Sondra...to come home" and killed her (Tr.1814). Despite this gap in time, the State submitted that "the murder of Sondra...was committed while the defendant was engaged in the commission of another unlawful homicide of Amand..." and vice versa (L.F.385,391) Defense counsel objected that this multiple murder aggravator was unconstitutionally vague (Tr.1847-1851), but counsel did not include this error in the motion for new trial. Review, therefore, is for plain error and manifest injustice. Rule 30.20. This error violated Bobby's state and federal rights to due process, a properly instructed jury and freedom from cruel and unusual punishment.

The jury found that each murder was committed in the course of the other (L.F. 414-415). This aggravator cannot serve as a basis for upholding Bobby's death sentences because it does not narrow the class of defendants who are eligible for the death penalty. *See Cartwright, supra*. It provides no principled way to distinguish among the few upon

whom the death penalty will be visited from those on whom it will not. Further, it allows each homicide to be double-counted. Each murder is counted in its own right and then again in aggravation of the other. This unduly enhances the qualitative value of this aggravator. *Engberg v. Meyer*, 820 P.2d 70,89 (Wyo.1991). Although *State v. Griffin*, 756 S.W.2d 475,489 (Mo.banc1988) and *State v. Powell*, 798 S.W.2d 709,715 (Mo.banc 1990) rejected similar arguments, two other state Supreme Courts have retreated from decisions similar to *Griffin* and have acknowledged that this sort of double-counting is unconstitutional. See *Engberg, supra*; *Willie v. State*, 585 So.2d 660 (Miss.1991). This Court, too, should reconsider its prior decisions and recognize that duplicating aggravators is unconstitutional. See *U.S. v. Farrow*, 198 F.3d 179,194-195 (6th Cir.1999) (in condemning similar “double-count[ing],” the *Farrow* court noted, “we ought not resort to an additional penalty ... absent some additional aspect of the assailant’s conduct that separately warrants it.”).

The “depravity of mind” and multiple murder aggravators are unconstitutionally vague, and this Court must strike the jury’s finding based on them. Since each aggravator is invalid, *see also* Point XVI, *supra*, this Court must reverse Bobby’s sentences and order him sentenced to LWOP. Alternatively, if this Court finds one valid aggravator, it must remand for a new penalty phase. As Point XVI, *supra*, discusses, removing any aggravator from the scales would have left Bobby *eligible* for death, but it is for a jury to decide whether the new balance would weigh in favor of life or death. See *State v. Storey*, 986 S.W.2d 462,464 (Mo.banc1999); *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir.1995). Thus, this Court must remand for a new penalty phase trial.

Conclusion

This trial did not produce a fair ascertainment of the truth, and this Bobby Joe Mayes respectfully requests the following relief from this Court:

<u>New Trial</u> :	Points I,III,V,VII,VIII,IX,X,XII,XIV,XV,
<u>New Penalty Phase</u> :	Points I,IV,VIII,XI,XII,XIII,XVI,XVII,XVIII
<u>Allocution</u> :	Point II
<u>LWOP</u> :	Points VI,XVIII

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief, excluding the cover, the signature block, this certification, the certificate of service, and appendix, does not exceed 31,000 words.
- ✓ The floppy disk filed with this brief contains a copy of this brief. It has been scanned for viruses by a McAfee VirusScan program, which the Public Defender installed approximately eleven months ago, and, according to that program, this disc is virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were hand delivered, this 1st day of March 2001, to the Office of the Attorney General, Supreme Court Building, 207 West High Street, Jefferson City, Missouri 65101.

Gary E. Brotherton